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RECENT DECISIONS

Recent Decisions is an annual communication from the Legal Section of the Indiana Department of Education to the Indiana State Board of Education, the Indiana Board of Special Education Appeals, Administrative Law Judges/Independent Hearing Officers, Mediators, and other constituencies involved in or interested in publicly funded education. Full texts of opinions cited or documents referenced herein may be obtained by contacting Kevin C. McDowell, General Counsel, at (317) 232-6676 or by e-mail at <kmcdowel@doe.state.in.us>.

In this Issue:

FROM THE COURTS . . .

Although there were several court cases reported in 2000 addressing educational issues in Indiana, the three major cases all involved special education under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq*., as implemented through the rules of the Indiana State Board of Education at 511 IAC 7-17 *et seq.* ("Article 7"). In 2001, several education-related decisions by the Indiana Supreme Court are expected, especially with regard to suspicionless drug-testing of public school students under Indiana's constitution, the extent of authority of a governing body when expelling a student from school, and the authority of a trial court to cite for contempt the Indiana High School Athletic Association and award attorney fees against it.

RESIDENTIAL PLACEMENTS FOR EDUCATIONAL REASONS

Indiana, by statute at I.C. 20-1-6-19, authorizes the State Superintendent of Public Instruction to contract with public and private agencies to provide funding for extraordinary services in order to ensure that students with significant disabilities receive a free appropriate public education (FAPE). These "extraordinary services" include services not typically offered by an Indiana public school district as well as residential placements when such are needed in order to provide educational services to the student.[1] In Evans v. Evans, 818 F.Supp. 1215 (N.D. Ind. 1993), the State of Indiana entered into an Agreed Entry with the plaintiff class to resolve a dispute over alleged delays in obtaining residential placements for students with disabilities who require same in order to receive educational services.

A member of the class later brought a claim for reimbursement under the Agreed Entry. When the Indiana Department of Education (IDOE) declined to reimburse the parents for a unilateral placement in a hospital, the parents requested a hearing. The hearing officer ordered IDOE to reimburse the parents, but IDOE appealed his decision to the Board of Special Education Appeals. The BSEA reversed the hearing officer.[2] The parents sought judicial review.

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[1]The current State Board of Education regulation implementing this statute is found at 511 IAC 7-27-12. It is not uncommon to hear this law and the state appropriation known as "Rule S-5" or simply "S-5" after its original designation.

[2]The BSEA also issued a rare letter of reprimand to the hearing officer regarding the conduct of the hearing, failure to include significant findings of fact apparent from the record, failure to craft appropriate conclusions of law devoid of argument, and failure to establish the legal standing of the public school district as a party in the hearing. The State Superintendent, upon receiving a copy of the reprimand, removed the hearing officer from the list of qualified hearing officers, whereupon he sued. The Indiana Court of Appeals upheld the State Superintendent's authority to do so. See Reed v. Schultz, 715 N.E.2d 896 (Ind. App. 1999).

In Evans v. Reed,[3] Cause No. 2:91-CV-216-TS (N.D. Ind. 1999), the federal district court, in an unpublished decision, upheld the BSEA, noting that although the student's local school district agreed she required residential placement for educational reasons, by the time the school applied for extraordinary funding from IDOE, she had been placed unilaterally at a psychiatric hospital. Her stay at the hospital involved medical treatment, including various therapies. The cost exceeded $120,000.[4] The court determined the student did receive due process and that the "prompt placement" requirement in the Evans' Agreed Entry was not violated because the Agreed Entry recognizes that there will be "special circumstances" that vitiate the residential placement of a student within thirty (30) days of the student's case conference committee determining such a need is educationally necessary. IDOE did not receive the application for extraordinary funding until after the student had been hospitalized. Further, the in-patient hospitalization for her serious medical condition constituted a "special circumstance." When the student was released from hospitalization, she was placed promptly in a facility where she could receive a FAPE. The court concluded that her placement was timely.

The student argued that the services she received in the hospital were "education and related services," but the IDOE characterized such services as medical in nature, which is excluded from the IDEA as a related service. The court noted that the hospital records indicate the student received medical services, adding that in-patient psychiatric services are not the type of educational and related services contemplated by the IDEA and, hence, are not reimbursable. Although certain types of services that are medical in nature are "related services" and must be provided within a school context, where such services require a physician or a hospital setting, the services are medical in nature and not related. Cedar Rapids Comm. Sch. Dist. v. Garret F., 526 U.S. 66, 119 S.Ct. 992 (1999).[5] The court also noted that the student never proved any educational costs from her hospitalization. The hospital bills did not enumerate any separate educational costs, nor did the student prove such costs at the hearing.

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[3]Because this dispute arises from the Evans v. Evans class action, the caption is not consistent from court to court. The federal district court substituted the current State Superintendent's name for the former State Superintendent, but, as will be noted, the 7th Circuit left the former State Superintendent's name as the named defendant but substituted the student's name. The correct caption should be Butler v. Reed.

[4]In a separate involuntary commitment proceeding, the county where the student lived was determined financially responsible for the costs of the hospitalization. In re Commitment of A.N.B., 614 N.E.2d 563 (Ind. App. 1993). The IDOE argued at the hearing and on appeal that the Court of Appeals' decision was controlling law on the issue of financial responsibility.

[5]See "Medical Services, Related Services, and the Role of School Health Services," **Quarterly Report** July-September: 1997; October-December: 1997; and July-September: 1998, available on-line at <www.doe.state.in.us/legal/>.

The parents appealed to the 7th Circuit Court of Appeals, which affirmed the district court. Butler v. Evans, 225 F.3d 887 (7th Cir. 2000).[6] The 7th Circuit agreed that the student's hospitalization constituted a "special circumstance" under the Agreed Entry in Evans. The court also noted that the student's IEP supported a residential placement for educational reasons and not a psychiatric hospitalization. At 892.

> The IDEA does not require reimbursement of medical-care costs for psychiatric hospitalization when, as here, the hospitalization addresses the child's medical, social or emotional disabilities apart form her special education needs.

At 894. In this case, the student's hospitalization "was not an attempt to give her meaningful access to public education or to address her special educational needs within her regular school environment." Id. Rather, she was committed to a psychiatric hospital where "education was not the purpose of her hospitalization." Her hospitalization was not an "accommodation made necessary only to allow her to attend school or receive education." At 894-95.

REIMBURSEMENT, PRIVATE SCHOOLS, AND APPROPRIATE EDUCATION

"Private School Placements and Reimbursement," Recent Decisions, 1-12: 1998 contained a report on the Congressional effort through the 1997 reauthorization of the Individuals with Disabilities Education Act (IDEA) to provide more guidance on reimbursement issues where a parent unilaterally enrolls the parent's child in a private school because of dissatisfaction with the public school program. Under 20 U.S.C. §1412(a)(10)(C), a parent can be reimbursed for the cost of a private school placement if the public school "had not made a free appropriate public education [FAPE] available to the child in a timely manner prior to that enrollment."[7] The amount of reimbursement may be reduced or denied by an administrative adjudicator or a court if the parents, at the most recent meeting where the Individualized Education Program (IEP) was developed (a "case conference committee" in Indiana), did not inform the pubic school of their intent to reject the public school program and enroll the student in a private school, or if the parents fail to give the public school notice of their intentions at least ten (10) business days prior to removal of the student from the public school. Reimbursement can also be reduced or denied if the public school, prior to removal of the student, informs the parent of its intent to evaluate the student but the parents fail to make the student available for the evaluation.

The requirement that the parent provide notice to the public school as a precondition for full reimbursement can be excused if the parent is illiterate, there is an emergency requiring immediate placement, the public school prevented the parent form providing the notice, or the public school failed to inform the parent that such notice is required. §1412(a)(10)(C)(iv).

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[6]See Footnote 3, *supra*.

[7]Also see 34 CFR §300.403 for the corresponding federal regulation. Indiana's regulation can be found at 511 IAC 7-19-2 ("Article 7").

IDEA does not state that, as a precondition for reimbursement, the private school must provide the FAPE the public school ostensibly could not or would not provide. Administrative and judicial constructions, relying upon two important U.S. Supreme Court decisions,[8] have held that the private schools are not required to comply with the extensive requirements of IDEA, notably the FAPE and "least restrictive environment" (LRE) requirements. As a consequence, adjudicators look more to whether the private school provided some "educational benefit" to the student.

Although Indiana had considered these issues in administrative hearings, the first reported court decision did not occur until 2000. Nein v. Greater Clark Co. Sch. Corp., 95 F.Supp.2d 961 (S.D. Ind. 2000) was the culmination of a difficult educational planning process for a child with severe dyslexia, conflicting educational assessments, an emotional due process hearing, a divided appeals panel, and, ultimately, a cautious federal district court.

The student had severe dyslexia. Through the fourth grade, he had made little measurable progress in reading, although this was in dispute. Evaluations by both school personnel and outside evaluators disagreed as to the student's actual reading potential. The school had employed a specific reading methodology, which it also proposed for his fifth grade year. The school complied with the procedures for staffing case conference committees, including the requirements to provide the parents with notices of the procedural safeguards.[9] The procedural safeguards notice contained information regarding the right of a parent to request placement in a private school at public expense along with the additional requirement that the parent notify the school of such an intention when the parent would like the placement publicly funded.

The parents did enroll the student in a private school that specializes in the education of students with dyslexia but only for a six-week summer program. The parents did inform the school of their intent to do so, but did not indicate that they expected to be reimbursed. The school and the parents continued to meet to discuss possible strategies for the student's fifth grade year. Following one case conference committee meeting in April 1998, the parents requested a due process hearing. The Independent Hearing Officer (IHO), after a pre-hearing conference, ordered additional evaluations to be conducted. One of the evaluators was somewhat pessimistic regarding the student's actual potential, while the other–a reading diagnostician–recommended "direct teaching using multisensory, structured, sequential techniques" that "directly teach the sound-symbol relationship and the blending of individual phonemes into syllables. At 970.[10]

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[8]Burlington v. Dep't of Ed., 471 U.S. 359, 105 S.Ct. 1996 (1985) and Florence Co. Sch. Dist. Four v. Carter, 510 U.S. 7, 114 S.Ct. 361 (1993). It is these two decisions that are essentially codified at 20 U.S.C. §1412(a)(10)(C).

[9]See, *e.g.*, 511 IAC 7-22-1 and 34 CFR §300.504.

[10]Both the IHO and the district court relied heavily on the reading diagnostician. The court referred to her as "an expert on dyslexia," 95 F.Supp.2d at 970. The BSEA did not agree that she was an "expert," finding instead that she could be accurately described as a "specialist." A

The parents and school continued to negotiate through the case conference committee through October of 1998. Although the school indicated that it could provide a program similar to the one the reading diagnostician described, this was never incorporated into an IEP. The parents remained dissatisfied, and asked that the hearing be held, which it was in November of 1998. The parents had continued the student's enrollment in the private school, and apparently did not intend to return him to the public school in any event. However, the parents never indicated to the school that this was their intention.

The IHO found the school did not provide a FAPE to the student. He ordered two years of compensatory education at the private school "unless the [school district] can demonstrate by clear and convincing evidence to the Indiana Division of Special Education that [the school district] can successfully teach a dyslexic student...[,]which includes appropriate teacher training in the concepts of teaching dyslexic students." The school's teachers were to receive in-service or other specialized training in the teaching students with dyslexia. He also ordered the school district to reimburse the parents for the summer school program at the private school, as well as the necessary transportation to and from the school. Future case conference committee meeting were to include a member of the private school. The case conference committee was ordered to review the private school's social studies and science curriculum to determine whether "separate tutorial services in these areas are required."

The school appealed to the BSEA, which by 2-1 vote, reversed the IHO, finding that the student's *potential* to read and *actual* reading ability had basically leveled out. Also, the BSEA noted the parents, although they were aware of the requirement to provide notice to the school of their intent to enroll the student in a private school, never advised the school of their intent to do so. Both the IHO and the BSEA noted that 20 U.S.C. §1412(a)(10)(C) does not act to foreclose reimbursement because notice was not given but vests discretion in the adjudicator to reduce or deny reimbursement. The court echoed this observation. 95 F.Supp.2d at 980.

Upon judicial review, the district court chose a middle ground. The court found the school did not provide a FAPE to the student because the school's program did not provide this student with "a direct reading program using multisensory, structured, sequential techniques, and even if they had, [school personnel] were not qualified to work with dyslexic children." The private school, the court added, did use such a teaching method and had a history of working with students with dyslexia. 95 F.Supp.2d at 981. However, "[t]he record shows that the [parents] failed to provide written notice to [the school district] of their intention to enroll [the student] at [the private school]." Although the parents argued that the school was aware they were planning to do so, the court noted (as did the IHO and the BSEA) that the parents never advised the school in writing of their intention to reject the school's proposed IEP, their intention to enroll the student

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majority of the Board of Special Education Appeals (BSEA) believed the independent evaluation by a neuropsychologist was more credible, notwithstanding his pessimistic assessment of the student's reading potential. Neither the IHO, the BSEA, nor the court placed any reliance on the school's assessor, whose testimony appeared somewhat cavalier. See 95 F.Supp.2d at 968. This likely detracted from the school's presentation of its case.

in the private school's summer program, and their intention to enroll him in the private school for the next school term. The IHO, however, imputed knowledge to the school; the BSEA did not, especially given the school's continued efforts to negotiate an acceptable IEP into October of 1998. The court noted that the parents had indicated to the school of their intentions, but what they failed to do was inform the school that they intended to do so "*at public expense*." 95 F.Supp.2d at 984(emphasis original). Accordingly, the court found the school and the parents failed to meet their respective obligations under IDEA.

> The court finds that the most equitable remedy here is to order Greater Clark to reimburse the Neins for one-half of the reimbursement originally ordered by the initial hearing officer...

95 F.Supp.2d at 985. The court ordered the school to reimburse the parents for one-half the cost of the summer program, one-half the tuition for the private school tuition, one-half the reasonable cost of transportation to the private school (reimbursement at the rate per mile the school pays its employees) for the summer school program, one year of compensatory education (rather than two), and did not address the continuing in-service training of the school's teachers or the involvement of the private school in any future case conference committee meetings.[11]

Reimbursement for privately obtained educational services continues to be one of the more litigated areas. The following are recently reported cases involving this issue.

1. Board of Education of LaGrange Sch. Dist. No. 105 v. Illinois State Bd. of Education, 184 F.3d 912 (7th Cir. 1999). The student had attended a private preschool with students who were not disabled. When he turned three years of age, his parents referred him to their local school district for an evaluation to determine whether he was eligible for special education and related services. Although he was determined eligible, the school district offered placements in another school district and primarily with students with disabilities. It also offered a program in the school district, but this was a program designed for students at risk of academic failure and did not take into consideration the student's IEP. Through the hearing process, it was determined that all the placements offered by the school district failed to provide a FAPE to the student because the placements were not the LRE given the student's unique needs. The federal district court affirmed the decision and ordered the school to pay for the student's private preschool program. The 7th Circuit Court of Appeals affirmed the district court's decision, noting that the student should be placed with "typically developing children" because "his disability and IEP did not prevent him from benefitting from a more inclusive setting." 184 F.3d at 916. Because the placements offered by the public school were inappropriate and the private preschool program was appropriate, reimbursement was awarded.

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[11] Article 7 requires that a representative of a private school where an eligible student is enrolled be invited to case conference committees, and should such personnel not attend, the public agency is to "take other steps to obtain the private school's or facility's participation in the planning of the individualized education program." 511 IAC 7-27-3(e)(7).

2. Dale M. v. Bd. of Education of Bradley-Bourbonnais High School Dist. No. 307, 237 F.3d 813 (7th Cir. 2001). The 7th Circuit determined the parent was not entitled to reimbursement for a unilateral placement secured by the parent for her 14-year-old child who had a history of disrupting classes, drug and alcohol abuse, burglary, auto theft, and habitual truancy. Although he had been placed by his school district in a "therapeutic day school" for a period of time, this was not due to any disability. Evaluations did not indicate any learning disability; rather, he was considered "conduct disordered." After being jailed for another criminal offense, his mother secured his release and placed him at a "boarding school for difficult children" in Maine and demanded the school pay for the placement. The Maine school offered no psychiatric or other medical treatment for substance abuse or for any of the student's other difficulties. The student was belligerent in this placement as well, and was excluded from most school activities. The only benefit was confinement of the student, which resolved the truancy problem, but "confining a truant student" is not reimbursable under IDEA. The 7th Circuit referred to the private placement as "a jail substitute." The student's problems "are not primarily educational." He has average intelligence and suffers from no cognitive disorders or defects. "His problem is a lack of proper socialization, as a result of which, despite his tender age, he has compiled a significant criminal record." 237 F.3d at 817. A residential placement under IDEA must be for educational reasons, not for confinement of an incorrigible.

3. Patricia P. v. Bd. of Ed. of Oak Park (IL.), 203 F.3d 462 (7th Cir. 2000). A parent seeking reimbursement for a unilateral private school placement needs to demonstrate cooperation with the public school district in allowing it an opportunity to provide an appropriate education to the student. "[W]e hold that parents who, because of their failure to cooperate, do not allow a school district a reasonable opportunity to evaluate their disabled child, forfeit their claim for reimbursement for a unilateral private placement." At 469. Schools, however, must also be cooperative in the placement process; but in this case, it was the parent who prevented the school from evaluating the student by unilaterally placing him in a private school in Maine.

4. James v. Upper Arlington City Sch. Dist., 228 F.3d 764 (6th Cir. 2000), *reh.* and *sug. for reh. denied.* This Ohio case has facts somewhat similar to Nein, *supra*. The parents removed their child from the public school because he was in the 4th grade but could not read due to severe dyslexia. At a meeting to review the student's IEP, the school advised the parents that the student would never learn to read and would "have to learn there are other ways to get information besides reading." At 766. Over the next six years, the parents placed the student in three different private schools where he did learn to read. Although the parents continued to have interaction with the school district, they did not seek reimbursement of the tuition for the private schools. During the student's private school experience, the parents were discouraged from seeking an IEP team meeting until they re-enrolled the student in the public school and gave the school an opportunity to train someone to work with him. Id. Over six years after withdrawing him from the public school, the parents asked for a due process hearing, seeking retroactive and prospective tuition for the student's private school education. Initially, their hearing was dismissed because the claims were not brought timely. Although

the 6th Circuit Court of Appeals agreed some of the claims were not timely brought, the court was concerned about the discussion between the parents and the schools when the parents sought a revised IEP and were told they would have to re-enroll the student before an IEP would be developed. The court noted that "[t]he obligation to deal with a child in need of services, and to prepare an IEP, derives from residence in the district, not from enrollment." At 768. Although the school had provide notice of procedural safeguards previously, it did not update this notice nor did it provide it to the parents when it declined to convene an IEP team meeting in 1994, five years after the student was withdrawn from the public school. The school's refusal "to do an IEP pre-enrollment constitutes ...a violation" of the parents rights under IDEA. Id. The parents were precluded from consideration for retroactive reimbursement prior to the 1994 meeting, but they were permitted to pursue their claims for tuition from the 1994 meeting forward.

5. Knable v. Bexley City School District, 238 F.3d 755 (6th Cir. 2001), *cert. den.*, Bexley City Sch. Dist. v. Knable, 121 S.Ct. 2593 (2001), illustrates the situation where procedural lapses by the school district are substantive enough to result in a denial of a FAPE, thus supporting reimbursement for a private school placement. The student had a history of behavioral problems. He was eventually referred for evaluation. Although the school completed the evaluation and determined the student eligible for special education and related services, it failed to develop an IEP for the student and persisted in attempting to establish a placement prior to development of an IEP. The parent repeatedly insisted on an IEP and was eventually provided with a "draft" IEP that was deficient in many particulars. One placement the school did propose would have resulted in the parents paying $80 a day in therapy costs. Although a hearing officer and the district court found the school had offered a FAPE, the 6th Circuit Court of Appeals reversed, finding that the many procedural violations resulted in substantive harm to the student and constituted a denial of a FAPE to the student.

> [A] procedural violation of the IDEA is not a *per se* denial of a FAPE; rather, a school district's failure to comply with the procedural requirements of the Act will constitute a denial of a FAPE only if such violation causes substantive harm to the child or his parents. [Citations omitted.] Substantive harm occurs when the procedural violations in question seriously infringe upon the parents' opportunity to participate in the IEP process.

At 765. Not only did the school fail to convene an IEP team meeting and develop an IEP, it offered a placement that violated the "at no cost" requirements of IDEA. At 769. The school district also challenged the private school placement chosen by the parents, asserting that, as a school that served a narrowly defined group of students with disabilities, it did not meet the LRE requirement of IDEA. This is a common challenge made by public school districts challenging the appropriateness of the private school where the parents have unilaterally enrolled their children. It was raised in Nein as well.

> [P]arents who have not been treated properly under the IDEA and who unilaterally withdraw their child from public school will commonly place

> their child in a private school that specializes in teaching children with disabilities. [Citation omitted.] We would vitiate the right of parental placement recognized in *Burlington* and *Florence County* were we to find that such private school placements automatically violated the IDEA's mainstreaming requirement.

At 770. As a result, the school was responsible for the costs of the private school placement obtained by the parents.

6. Suzawith v. Green Bay Area School District, 132 F.Supp.2d 718 (E.D. Wisc. 2000) also involved allegations of procedural errors, but the court did not find that the school district's procedural lapses were so substantive as to deny a FAPE and, accordingly, denied reimbursement. The student had become increasingly difficult, especially towards her mother. The mother was encouraged to refer the student for an evaluation to determine whether the student would be eligible for special education and related services. While the school was conducting an educational evaluation, the mother placed the student unilaterally in a psychiatric hospital in another state. The parent and the school agreed to complete the referral process but would wait until the student returned before discussing placement. (It was this delay between referral and development of the IEP that became the focus of the legal analysis whether such a procedural error was substantive.) When the student returned, an IEP was developed and implemented. However, the parent again placed the student in the psychiatric hospital and requested a hearing to recover the costs of these placements. The hearing officer denied reimbursement, and the district court upheld the hearing officer's decision, noting that a procedural violation "must result in a denial of appropriate educational benefit to the child in question in a manner similar to, or on par with, a lack of full parental involvement at the IEP formulation stage." At 725. This procedural lapse did not result in a denial of a FAPE to the student, especially as the school did not recommend–and would not have recommended–a psychiatric hospital placement for the student in order for her to receive a FAPE.

7. Bd. of Ed. of the Pawling Central Sch. Dist. v. Schutz, 137 F.Supp.2d 83 (N.D. N.Y. 2001) also involves allegations of substantive procedural violations resulting in a denial of a FAPE. The student in this case had severe dyslexia similar to the student in Nein *supra*. The parents rejected the school's proposed IEP and enrolled the student in a private school specializing in serving children with learning disabilities. Eventually, through a hearing and subsequent negotiations, the school paid for several school years at the private school. However, when the parents rejected the IEP for the 1999-2000 school year and asked for a hearing, a dispute arose as to what the current educational placement would be for the student.[12] The parents

[12]IDEA requires that a student remain in his current educational placement when a hearing is requested. This is often referred to as the "Stay Put" rule. The parties can agree to a different placement, but absent such an agreement, the student remains in his last agreed-upon placement, taking into consideration typical grade advancement. See 20 U.S.C. §1415 (j), 34 CFR §300.514, and 511 IAC 7-30-3(j). .

asserted the student's current educational placement was at the private school, and asked that the public school fund the private school placement during the pendency of administrative procedures. The school disagreed, stating that its proposed IEP had not yet been determined inadequate. The hearing officer agreed with the school district, but a review officer reversed, finding the private school was the "stay put" placement for the student until a final administrative decision is rendered. The school appealed, but the district court agreed with the review officer. The last agreed-upon placement was at the private school. The IDEA's "stay put" acts "as an automatic preliminary injunction." At 92, citing Svi D. by Shirley D. v. Ambach, 694 F.2d 904, 906 (2nd Cir. 1982).

A METHODOLOGY TO THE MADNESS: THE STRUGGLE BETWEEN EDUCATIONAL AND DEVELOPMENTAL NEEDS IN EARLY CHILDHOOD

As courts have noted, the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq.* as implemented by 34 CFR Part 300, is long on definition but short on guidelines. Definitions are either too nebulous for practical application or associated with various State standards that have to be established to implement the law. "Accordingly, the decisions by various courts are often inconsistent and decided on an ad-hoc basis." Bd. of Ed. of Kanawha Co. v. Michael M., 95 F.Supp. 2d 600, 606 (S.D. W. Va. 2000). One of the more nebulous concepts is "Free Appropriate Public Education" (FAPE), which is so ambiguous that its statutory and regulatory definitions prevent "effective application by the courts" of the term, often resulting in courts being "required to analyze and comprehend voluminous expert testimony and documentation concerning specialized teaching goals, methods, and standards of education." Id.

Nowhere is this more evident than in the increasing numbers of disputes involving children with autism in early childhood programs. Indiana experienced its first court challenge on methodology and early childhood autism during 2000 (see *infra*). At this writing, there are three active administrative cases.

Teaching methodology has long been considered sacrosanct and generally beyond the purview of the decision-making and program development inherent in the creation and implementation of an Individualized Education Program (IEP) for a child with a disability.[13] For example, Lachman v. Illinois State Board of Education, et al., 852 F.2d 290 (7th Cir. 1988), *cert. denied* 488 U.S. 925, 109 S.Ct. 308 (1988), involved a dispute concerning the methodology to be employed in the education of a child with a hearing impairment. The parents wanted their seven-year-old son to attend general education classes in a neighborhood school with a full-time cued speech instructor. The school district proposed placement in a Regional Hearing Impaired Program

[13]See "Methodology: School Discretion and Parental Choice," **Quarterly Report** January-March: 1999 (Dana L. Long, Legal Counsel).

(RHIP) that utilized total communication and relied upon sign language. The student would attend general education classes for approximately one-half of the school day with the remaining time spent in a self-contained classroom. The Seventh Circuit Court of Appeals determined:

> . . . Rowley[14] and its progeny leave no doubt that parents, no matter how well motivated, do not have the right under [IDEA] to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child [citations omitted].

852 F.2d at 297. Also see E.S. v. Independent Sch. Dist. No. 196 *et al*., 135 F.3d 566 (8th Cir. 1998) and Moubry v. Ind. Sch. Dist. 696, 9 F.Supp. 2d 1086, 1106 (D. Minn. 1998) ("It is well-settled that 'once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States,'" citing to Rowley).

The U.S. Supreme Court entered the fray when it decided Rowley, creating a two-part test for determining when a child with a disability has received a FAPE:

1. Has the public agency complied with the procedures established by the IDEA?

2. Is the IEP developed through the IDEA's procedures reasonably calculated to enable the child to receive educational benefits?

This is often referred to as the "minimal standard of appropriateness" in that an educational program will be considered adequate so long as the program is reasonably calculated to confer some educational benefit, but not that any actual benefit is realized in the final analysis. Courts have indicated that this is a somewhat low standard for school districts to meet but have expressed reluctance to find in favor of schools where the educational program would have conferred only *de minimus* or trivial academic advancement or otherwise failed to provide a "basic floor of opportunity." The Rowley court indicated that the "reasonably calculated" standard could be met where the IEP was designed "to enable the child to achieve passing marks and advance from grade to grade." 458 U.S. at 188.

This standard becomes more troublesome for parents, school personnel, and adjudicators where "educational benefit" is not so easily quantified by standard grading practices and advancement from grade to grade. The more non-traditional are a student's needs, the more individualized the student's IEP will need to be. It follows by necessity that non-traditional learners will be more involved in disputes over "methodology," particularly where parents and schools disagree regarding a student's primary needs. A "flash point" for such disputes occurs especially where a child with autism is beginning to transition from an early childhood program designed for infants

[14]Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982), the seminal case on defining what constitutes a "Free Appropriate Public Education" (FAPE).

and toddlers (up to two years of age) to a more traditional school-based program for children who are at least three years old.

FAPE versus Developmental Appropriateness

IDEA creates two different programs with two different (but not necessarily differing) emphases. Part B of IDEA is concerned with typical educational functions beginning with preschool. The emphasis under Part B is to ensure that children with disabilities who are at least three years of age have available to them a FAPE that provides special education and related services to meet their unique needs and prepares them for roles within the social construct. 20 USC §1401(d)(1)(A). "Special education" is generally defined as "specially designed instruction," 20 USC §1401(25), but this concept is greatly expanded from State to State by the requirement that States have personnel standards to ensure that those providing instruction are properly licensed and certified. 20 USC §1412(15). "Special education" is hardly a static concept.

Under Part C of IDEA, however, the emphasis is not upon instruction but upon "early intervention services" that are designed "to enhance the development of infants and toddlers with disabilities and to minimize their potential for developmental delay." 20 USC §1431(a)(1). Part C is more expansive is addressing family needs while Part B is concerned with the child's educational entitlement. Part C addresses developmental needs through an Individualized Family Service Plan (IFSP), and although there is a requirement to provide such early intervention services "to the maximum extent appropriate...in natural environments, including the home, and community settings in which children without disabilities participate," 20 USC §1432(4)(G), many services are provided in the home. Part B is implemented principally through an IEP. But Part B requires that a child with a disability receive a FAPE, and that this FAPE be provided in the "least restrictive environment" (LRE). LRE is not defined by IDEA, other than to require that public educational agencies ensure that "to the maximum extent appropriate" children with disabilities are educated with children who are not disabled, and that removal of a child with a disability from the typical educational environment occur "only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 USC §1412(5)(A). In short, FAPE and LRE, when combined, militate against home-based programs and separation of students with disabilities from students without disabilities.

If the reader is somewhat confused at this point, then the reader can somewhat appreciate the misunderstandings that occur when a parent of a child with autism–who, by the very nature of this disability, has significant delays in communication, socialization, and academic achievement–fails to appreciate the nuances of the FAPE/LRE relationship versus addressing the developmental needs of the child. This has led to a virtual explosion of litigation across the country, often embroiling the State educational agencies in what appear at first blush to be local disputes. Battle lines are drawn. Both sides have become armed with experts in autism or specific methodologies, ready to disparage any program proposed by the other. Polarization has occurred, sometimes encouraged by the purveyors of specific methodologies.

But this need not occur. Recent litigation has indicated that a number of public school districts have ameliorated their previous stances, which has been met by courts with no small degree of appreciation. Rather than dismiss outright a developmentally intense program the parents had been employing either through a Part C service agency or on their own, public schools have been more actively engaged in observing such home-based programs and employing some of the techniques as "related services" in the child's IEP.[15]

Board of Ed. of Kanawha Co. v. Michael M.., 95 F.Supp.2d 600 (S.D. West Va. 2000) involved a child who was diagnosed as having autism at the age of three. His parents established, at their own expense, a home-based program using the Lovaas methodology, employing the discrete trial training (DTT) method. This is a labor-intensive approach that employs two private instructors trained in the method to work with the child. In this situation, the program was supervised by a New Jersey learning center, which sent a representative to the family's West Virginia home every three months to conduct a one-day workshop for the instructors and the family. The family asked the school district to incorporate the home-based program into the child's IEP, which the school refused, offering instead its pre-school program of approximately two and one-half hours a day.[16] An Impartial Hearing Officer (IHO) found the school's program inadequate and the Lovaas program appropriate for this child's needs. As a consequence, the IHO ordered the school to incorporate the Lovaas program into the child's IEP. The school eventually offered twenty hours of DTT in a school setting, but the parents declined, believing this program inadequate. They withdrew the child from the school's pre-school program and continued the home-based program.

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[15]Although there are a number of competing programs aimed at addressing developmental needs of children with autism, many of them employ similar terms and techniques. A "discrete trail format" or "discrete trial training" (DTT) is a series of distinct, repeated lessons with clear beginnings and endings. Multiple trials are repeated over and over again until the child demonstrates mastery. The training usually occurs in a one-to-one setting with as little distraction as possible. Positive reinforcement is used to encourage compliance with any task. Tasks are broken down into small learnable segments (task analysis). Data collection and record-keeping are an integral part of this method. The data indicate when the child should move on to new tasks. This is a form of behavior modification. There are variations of this practice, such as "Compliance Training," "Clinical Perspective Method," "Applied Behavioral Analysis" (ABA), "Functional Analysis of Behavior and Positive Behavior Supports," "Priming," and "Lovaas," the latter named for O. Ivar Lovaas, the best-known practitioner of this method. Many of the Lovaas programs and variations thereof provide training to parents and other people in the techniques to be employed. It is not uncommon for Lovaas-type programs to require 35 to 40 hours of "therapy" a week, 52 weeks a year.

[16]Preschool programs under IDEA, based on numerous reported cases, tend to be 2.5 hours a day or 12.5 hours a week although IDEA does not dictate a length for an instructional day at any level.

When the child was to enter kindergarten, the school failed to prepare timely an IEP; and when it did, the IEP did not include any Lovaas methodology. At the time, the child was receiving 30 to 38 hours a week of one-to-one DTT at home. The parents again withdrew the child from school. The following school year, the child began attending school on a continuous basis pursuant to an IEP that met IDEA procedural requirements. The home-based program, however, was not included in the school's IEP. The parents sought another hearing and were successful in obtaining reimbursement for their expenses in implementing the home-based program. The school sought judicial review.

The district court, in finding for the parents, acknowledged the Rowley standards for assessing FAPE, but noted also that "the phrase 'reasonably calculated to provide some educational benefit' is only slightly less nebulous than the statutory definition contained in the IDEA itself." 95 F.Supp.2d at 606. "To determine whether an autistic child is receiving a free appropriate public education, the court must examine the IEP to determine whether it is reasonably calculated to provide benefit in academic areas and non-traditional areas critical to the child's education. Improvement in these areas is not as easily quantified through regular grading and advancement systems." Id.

In this case, the parents did not allege the school failed the first part of the test (procedural inadequacies or technical violations). The sole issue was whether the IEPs developed were reasonably calculated to enable the child to receive some educational benefit.

The court noted that whether or not an IEP meets the second part of the Rowley test depends upon the IEP "at the time of creation..." "Courts should not judge an IEP in hindsight; instead, courts should look to the IEP's goals and methodology at the time of its creation and ask whether it was reasonably calculated to provide educational benefit. [Citation omitted.] Ultimate success is not the touchstone of the inquiry; reasonable calculation is all that is required under the law." At 609.

In this situation, the child was participating in two separate programs and neither party could "provide a direct nexus between the benefits [realized by the child] and its own program." Id, at note 9. "Although progress may be an indicator of whether an IEP was reasonably calculated to provide a free appropriate public education, it is ultimately irrelevant whether the child did in fact make progress pursuant to the IEP." Id. The initial burden of proof is on the school district to prove the IEP, at its creation, was reasonably calculated to provide some educational benefit to the child. To meet its burden of proof, a school district must address adequately the following three areas:

1. Has the school district met all the procedural requirements for developing an IEP for the child, including the necessary elements for the IEP itself?

2. Are the annual goals, benchmarks, and short-term objectives set forth in the IEP reasonable in that goals must be realistic and attainable yet more than trivial and *de minimus*? This area can be addressed through the use of expert testimony, supported by materials and experience, as to what are reasonable goals for a child

of similar age and disability. State standards are important in this analysis, but where "objective state criteria" cannot be met, there must be specified individualized justification for why the child's disability prevents meeting such criteria.[17]

3. Is the methodology employed by the school tailored to meet the annual goals, benchmarks, and short-term objectives set forth in the IEP? This can also be established through expert testimony regarding "the methodology...generally accepted in the educational community for similarly situated children and recognized by other educational experts as a reasonable approach to providing similarly situated children with educational benefits."

At 610. The court opined that the school's IEPs may have met these three standards but the testimony demonstrated a "failure of proof." Id. Although the school knew there was a conflict between its methodology and the preferred methodology of the parents, it did not offer any evidence or testimony regarding the appropriateness of its approach beyond conclusory statements that the child progressed. "As an example of the deficiency, there was no testimony regarding whether the methodology is generally accepted by the educational community or recognized by other educational experts as reasonable." At 611. In contrast, "the parents' expert witnesses provided clear examples of the type of instruction that [the child] requires in light of his academic, behavioral, and social deficiencies." Id.

Related Services versus Special Education

IDEA's definition of "related services" is fairly broad. A "related service" can include "such developmental, corrective, and other supportive services...as may be required to assist a child with a disability to benefit from special education, and includes early identification and assessment of disabling conditions in children." 20 USC §1401(22). There is no definitive list of potential related services, although "medical services" are excluded from this term other than for diagnostic or evaluation purposes. 34 CFR §300.24(a). However, a "related service" must be associated with the special education program that is being provided to the child. This has been a central area of dispute in a number of cases, where the parent would like for the ABA or DTT program to be the student's "special education," but the public agency balks at elevating a

[17] As noted *supra*, IDEA incorporates by reference the standards for certification or licensure developed and maintained by a given State. Although a public agency must adhere to such State standards, especially in demonstrating it has provided a FAPE to an eligible child, a parent, to be reimbursed by the public agency, need not demonstrate that the services obtained privately for the child were provided by properly certified or licensed persons so long as the services were appropriate and the program offered by the public agency was not. See Still v. DeBuono, 101 F.3d 888 (2nd Cir. 1996), citing to Florence Co. Sch. Dist. Four v. Carter, 510 U.S. 7, 114 S.Ct. 361 (1993). Still involved a request for reimbursement for ABA services. The public agency argued that it should not have to reimburse the parents for services provided by uncertified student providers trained by the ABA therapist. The court disagreed.

therapy-type program to such a status because: (1) there typically is no individual justification for doing so; (2) State standards require instruction to be provided by a licensed teacher; and (3) the ABA/DTT program is an intensive, home-based program that interferes with the LRE mandate.

In Blackmon v. Springfield R-XII Sch. Dist., 198 F.3d 648 (8th Cir. 1999), the parents withdrew their child from the public agency's educational program and began an intensive, home-based training program that required individualized therapy by the child's parents for twelve hours a day. The program is sponsored by a group in Philadelphia and, as the court noted, "centers around the theory that stimulation of the brain, by repetitious activity and increased supplies of oxygen and carbon dioxide, will facilitate its growth." This group's "methodology is controversial and has been criticized in a number of medical journals." The school district declined to assume the cost of the program. School district personnel did observe the program and prepared a diagnostic summary. The eventual program offered by the school rejected assuming the cost or responsibility for the in-home program because, among other concerns, the in-home program would not provide the child with the ability (or opportunity) to interact with other children. The court found the school district complied with IDEA by providing instruction and services that meet State standards and by tailoring the IEP to meet the unique needs of the child. "Although the IDEA mandates individualized 'appropriate' education for disabled children," the court wrote, "it does not require a school district to provide a child with the specific educational placement that her parents prefer." The court was very much concerned with the LRE aspect of the different programs. LRE does not mandate placement with non-disabled peers where a child's disability is so severe that no educational benefit would be derived from doing so. However, in this case, the private program does not offer the child any opportunities to be around peers and offers no individualized justification for so restrictive a program. The private in-home program "fails to satisfy one of the primary objectives set forth in the IDEA, namely to educate disabled children in a classroom along with children who are not disabled to the maximum extent possible."

Gill v. Columbia 93 Sch. Dist., Missouri Dep't of Elementary and Secondary Ed., 217 F.3d 1027 (8th Cir. 2000), *reh. den.*, involved a similar collision between philosophy and practice. The child had autism. The school proposed a self-contained classroom with typical therapy services as related services. Although the child "was initially uncomfortable interacting with fellow students, ...his social anxiety diminished over the course of the school year. By the end of his summer program, [the child] had made progress toward several of the goals in his IEP." The IEP team reviewed and revised his IEP, increasing educational and therapy services. The parents, however, hired private Lovaas therapists and began an in-home Lovaas program that increased to 35 hours a week. In order to accommodate this regimen, the parents decreased the child's school attendance. His verbal skills increased as a result of the Lovaas program, but his social skills began to decline. The parents asked the school to assume the cost of the Lovaas program, asserting that the child now required 40 hours of such services a week. The school rejected the program, in part because of the lack of appropriate social interaction the child required, but did agree to make substantial modifications to his IEP, increasing one-to-one training and hiring an additional aide for the classroom. School personnel and the parents met several times over the subsequent months, but agreement was never achieved. The school

remained steadfast that the Lovaas program was too restrictive. The court, in finding for the school district, noted that one of the Congressional policies behind the IDEA "is to enable disabled children to be educated alongside their non-disabled peers rather than to be shut off from them." The school did consider the parents' preferences, did consult with an autism expert, and did propose substantial modifications to the child's IEP.

> Children with autism have difficulty in developing cognitive, linguistic, and social skills. Although early diagnosis and therapy improve the outlook for such children, autism experts have a variety of opinions about which type of program is best.... Parents who believe that their child would benefit from a particular type of therapy are entitled to present their views at meetings of their child's IEP team, to bring along experts in support, and to seek administrative review. The statute set up this interactive process for the child's benefit, but it does not empower parents to make unilateral decisions about programs the public funds.

At 1038. The IEP proposed by the school district "would have allowed [the child] to develop verbal, cognitive, and social skills," the three areas of deficiency common to autism. As such, the IEP provided the child a FAPE in the LRE.[18]

Steinmetz v. Richmond Community Schools, 33 IDELR ¶155 (S.D. Ind. 2000) demonstrates the shift that occurs between Part C and Part B programs. This case was decided on September 29, 2000. The circumstances are in stark contrast to the Michael M. case, *supra*. Although the parents preferred a home-based program as intensive as the one described in Michael M., the school was not resistant to considering elements of the program for inclusion in the child's IEP. As in Michael M., the child had autism that was diagnosed in his pre-school years. Attempts by the school to implement a school-based program were rejected by the parents, who wished to have the intensive home-based program and have the school assume the financial responsibility for it. The school district had developed an "Autism Team" comprised of school personnel who received initial and continuing training in evaluation and program development for students with

[18]The Missouri Department of Elementary and Secondary Education (MDESE) had been named as a party because the parents believed "the Department had fallen short of its obligations under IDEA by failing to implement a system which would identify children with autism and ensure that they receive appropriate early intervention." 217 F.3d at 1034. The court found the State complied with IDEA. Missouri has experienced a number of recent disputes of this sort. At the meeting of the National Council of State Education Attorneys (NCOSEA) in St. Louis last year, Heidi Atkins Liebermann, Legal Counsel for MDESE's Division of Special Education, led a panel in discussing this recent spate of cases, including the massive 101-page unpublished decision in Asbury v. Missouri Dep't of Elementary and Secondary Ed, (E.D. Mo., May 9, 2000), where the parents complained, in part, that Missouri failed to properly disseminate information related to promising practices for children with autism, specifically information related to Lovaas and his methodologies. The district court granted summary judgment to MDESE. On April 18, 2001, the 8th Circuit affirmed the grant of summary judgment in a brief unpublished decision. The U.S. Supreme Court declined to review the 8th Circuit's decision.

autism. Members of the team visited the child's home-based program to observe. From the data, an IEP was developed, but the parents rejected the program and requested a due process hearing. Expert testimony was presented by both sides. The IHO found the IEP reasonably calculated to provide the child with some educational benefit. He did not accord a great deal of credit to the expert testimony provided by the parents because the witnesses were particularly wedded to the home-based program and were not inclined to accept any school-based program. Their testimony was often contradictory.

The court dissected the arguments of the parties by employing some of the guidelines stated in Michael M. Although the court was willing to concede the academic credentials of the parents' experts, the school's Autism Team and their experts had considerably more actual experience in working with students similarly situated. The school's willingness to incorporate some of the ABA methodology into its proposed program, as well as its wealth of practical knowledge in establishing programs in other school districts through its consultants, supported a finding that the school's proposed IEP was adequate. The district court also rejected the parents' assertion that the ABA program is the "only educational modality that enjoys any quantifiable success" for children with autism. The parents presented no objective evidence to support this assertion, and case law does not seem to bear this out.

As the court noted at 33 IDLER at 538, citing Lenn v. Portland Sch. Committee, 998 F.2d 1083, n.8 (1st Cir. 1993):

> [J]udges are not especially well-equipped to choose between various educational methodologies. Where, as here, there is satisfactory record support for the appropriateness of the particular approach selected by the school department and approved by the state educational agency, a reviewing court should not meddle.

One of the exhibits introduced at the hearing before the IHO and upon administrative review by the Indiana Board of Special Education Appeals (BSEA) was a videotape that was a composite of various DTT sessions. In each of the video clips, the child is observed responding to cues from mostly college students trained in this particular ABA program. The child did not appear to initiate any activity on his own, responding only to adult cues. There was also a lack of reliable information regarding the child's ability to generalize mastered activities to other settings or activities. The opportunity for peer interaction and socialization–primary components in the proposed IEP and preschool program–could not be met in the intensive home-based program. The preschool program would promote educational goals, objectives, and benchmarks, while continuing to address the child's evident developmental needs. The school's proposal to incorporate ABA/DTT techniques as related services in support of the preschool program was reasonably calculated, in the estimation of the IHO, the BSEA, and the district court, to provide the child with a FAPE in the LRE. The BSEA's written decision is published at A.S. and Richmond Comm. Schs., Hearing No. 1055.98, 30 IDELR ¶208, 4 ECLPR ¶76 (SEA IN 1999).[19]

[19]For related cases similar to Steinmetz, see Renner v. Bd. of Ed. of Pub. Schs. of Ann Arbor, 185 F.3d 635 (6th Cir. 1999) and Dong v. Bd. of Ed. of Rochester Comm. Schs., 197 F.3d

The transition between Part C and Part B programs need not be a demilitarized zone. Recent case law has looked favorably upon school districts that do not reject outright a proposed methodology the parents have found beneficial in addressing the developmental needs of their children with autism. In many situations, it is apparent that parents do not understand the different policies and consequent emphases between Part C and Part B programs. It is equally evident that a number of school districts fail to recognize or appreciate this misunderstanding. But where the school districts recognize that some techniques employed in many of these therapeutic methodologies can be employed as "related services" in support of a child's "special education," the interactive process contemplated by IDEA can be met both by the letter of the law and in its spirit.

INDIANA STATE BOARD OF EDUCATION DECISIONS

The Indiana State Board of Education had a number of cases of first impression this past year, especially with regard to the "right to attend school" and what criteria should be applied to determine a student "emancipated" for legal settlement and school-attendance purposes.

Right To Attend School

In the Matter of M.A. and the School City of Whiting, **SBOE Cause No. 9911026** (SBOE 2000) presented the State Board of Education a question of first impression:

> Does an Indiana public school corporation have the right to deny enrollment of a prospective student solely because the prospective student is over the age of 18 years?

The Petitioner was over the age of 18 years of age, did not have a high school diploma, and had legal settlement within the Respondent school district, all of which the school acknowledged. The school had denied enrollment simply because the student was over the age of 18 years. The school argued that since the Petitioner was not of compulsory school age for attendance, the school was not required to provide her an education and the State Board had no jurisdiction. The school admitted it currently was educating students as old and older than Petitioner, who had last attended school in Mexico.

The State Board disagreed with the school's reasoning and its jurisdictional argument, noting that the right to attend school past one's 18th birthday was resolved at least by 1944 when the Indiana Attorney General, in an official opinion, construed Article 8, §1 of Indiana's Constitution as more expansive than the Respondent's interpretation, noting that the constitution

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793 (6th Cir. 1999).

does not grant a public school the authority to exclude pupils over twenty-one (21) years of age from attending school. 1944 **Ind. Attny. Gen. Op. 87**, p. 389.

Numerous publications by the Indiana Department of Education, some of which the State Board cited, have held consistently that receipt of at least a standard high school diploma is the means by which constitutional mandate is satisfied. Accordingly, the State Board found it had jurisdiction, determined the Petitioner had legal settlement and the right to attend school, and ordered the Respondent to either enroll the student or arrange for her to be educated through a transfer tuition arrangement. In any case, her right to attend school is also a right to receive educational services tuition free.[20] The State Board's decision is included as **Attachment A.**

Emancipation and Legal Settlement

The State Board also was called upon to address the legal and factual underpinnings of "emancipation" for school-attendance purposes, issues not previously addressed. At issue was the meaning of I.C. 20-8.1-6.1-1(d), which states that a student will be considered emancipated for legal settlement purposes (and, hence, the right to attend school tuition free) when the student:

(a) Furnishes the student's support from the student's own resources;
(b) Is not dependent in any material way on the student's parents for support;
(c) Files or is required by applicable law to file a separate tax return; and
(d) Maintains a residence separate from that of the student's parents.

Indiana case law does not address "emancipation" from a legal settlement standpoint. Nearly all case law involves child support. The most recent reported case is Dunson v. Dunson, 744 N.E.2d 960 (Ind. App. 2001), which recited the history of common law and statutory interpretations of what constitutes "emancipation." The plaintiff was 17 years old and attending high school. However, he left his parents home several years earlier and lived with a relative in a different school district. His parents provided negligible support and were not otherwise involved in his life. The common law states that emancipation frees a child from the care, custody, and control of the child's parents. What constitutes emancipation is a question of law, but whether there has been an emancipation is a question of fact. Stitle v. Stitle, 197 N.E.2d 174, 182 (Ind. 1964). Although emancipation is never presumed but must be established by competent evidence, this does not require proof of an express or formal contract. Emancipation may be shown by circumstantial evidence, by express agreement, or by the conduct of the parties, or by the acts and conduct of the parent and child. Allen v. Arthur, 220 N.E.2d 658, 660 (Ind. 1966).

The operant facts need to demonstrate that the child has placed himself beyond the control and support of his parents. This may be done by voluntarily leaving the home of the parent and

[20]It is noteworthy the State Board did not order her enrolled in the Respondent's high school. Her age at the time of the hearing–19 years of age–would seem to indicate that adult educational opportunities may be appropriate. Accordingly, the State Board provided the Respondent with several options with respect providing educational services to the Petitioner.

assuming responsibility for his own care. Pocialik v Federal Cement Tile Co., 97 N.E.2d 360 (Ind. 1951). "The salient feature of these situations is *the child creates a new relationship between itself and its parent,* relieving the parent from the responsibilities of support." Dunson, 744 N.E.2d at 967 (emphasis original). The question is not one of whether the child is capable of supporting himself but whether the child is, in fact, supporting himself without the assistance of his parents. Taylor v. Chaffin, 558 N.E.2d 879, 883 (Ind. App. 1990). In the Dunson case, the court determined he was emancipated because it was his decision to leave his parents' house and move in with his relative, the parents acquiesced in this arrangement and did not attempt to exercise any parental rights, and the child was dependent upon the relative for care, control and support.

The first major dispute before the State Board was In the Matter of N.A.S. and the Fort Wayne Community Schools, **SBOE Cause No. 0009028** (SBOE 2000), included herein at **Attachment B**. The student was over 18 years of age and previously lived with his grandparents in a neighboring school district. He moved into a residence within the Respondent school district, executed a lease, opened a checking account, obtained a credit card and a video club membership, and secured part-time employment. He enrolled in Respondent's school, intending to complete his high school education. The Respondent requested that he supply various documentation, which he did. Nevertheless, the Respondent expelled him for lack of legal settlement, claiming that Petitioner's father lived in a different school district although Petitioner had not been living with his father and his father had not been providing any support. The State Board noted that the local expulsion process was seriously flawed procedurally and included an erroneous, misleading appeal statement. Because of the lack of any relevant fact-finding by the Respondent, the State Board conducted a *de novo* hearing to establish a record and take testimony.

The Respondent argued that Petitioner was not emancipated because the lease agreement required him to pay only $1.00 a year, although the Respondent acknowledged that the lease agreement was valid and that similar lease agreements are not uncommon in commercial transactions. Respondent argued that a rent of $400 would be necessary to establish emancipation, but cited to no authority for this proposition. Respondent also ignored Petitioner's employment, voter registration card, banking account, and similar indices of legal settlement, arguing instead that, to be emancipated, the student would have to be "totally self supporting."

The State Board reversed the Respondent school, noting that the Respondent does not have any legally defensible standards for assessing emancipation and never represented to Petitioner how it determines emancipation beyond "professional judgment." This was insufficient. The Petitioner was maintaining a residence separate from his parents' residence (in this case, Petitioner's grandparents and not his biological father, who was not considered Petitioner's "parent"). There is no requirement that a student be "totally self-supporting" to be considered emancipated. No such language appears in statute or in case law. The Petitioner was providing for his support "from the student's own resources." The fact the Petitioner had a favorable lease

agreement is of no consequence. The Petitioner was plainly emancipated and had legal settlement. He should not have been denied enrollment.[21]

Respondent had a return engagement with the State Board. In Re the Matter of S.M., II and the Fort Wayne Community Schools, **SBOE Cause No. 0101001** (SBOE 2001), the State Board again noted the inadequate expulsion proceedings and erroneous appeal statement employed by the Respondent, citing to its decision in N.A.S., *supra*. The facts in this case are more peculiar, however. Petitioner was over 18 years of age and had not completed his high school education. He had previously attended Respondent's school, but when his parents divorced, he lived for a time with his father, who remained in Respondent's area. Thereafter, the parents agreed informally that Petitioner would live with his mother in another state, which he did for two years. Petitioner left his mother's residence and moved back to Respondent's district and into a residence located therein with the intention of completing his high school education. Respondent requested certain documentation from Petitioner, which he supplied. Thereafter, the Respondent expelled him for lack of legal settlement, stating that Petitioner's legal settlement was with his mother who lived in another state and who did not have legal custody. The State Board had to conduct a *de novo* hearing because Respondent did not develop a sufficient record and made no relevant, reviewable findings of fact or conclusions of law.[22]

The State Board found the Petitioner had moved from his mother's house, was not receiving support from her or his father, is employed part-time, has opened a savings account, and has other indices sufficient to demonstrate the Petitioner is emancipated for legal settlement purposes. The Respondent's decision was reversed, and it was ordered to enroll the Petitioner. The decision is **Attachment C.**

Procedural Requirements

It wasn't only the State Board that had to address emancipation. The Indiana Department of Education, Division of Special Education (DOE/DSE), addressed emancipation, legal settlement, and legally sufficient procedures in Complaint No. 1615.00.[23] The student was 18 years old and

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[21]During the course of the hearing, the Respondent's witnesses were posed a hypothetical, which is included in the written decision: "If an 18-year-old student with a child moves to live with someone in Respondent's district but has no employment, no checking account, and is surviving with public assistance, would this person be permitted to enroll in Respondent's school district?" Respondent responded in the negative, noting such a person would not be "totally self-supporting."

[22]Oddly enough, the Respondent, during its expulsion proceedings, stated it did not know the whereabouts of Petitioner's father, although its own testimony and documentation supplied to it by Petitioner indicated his address and that it was within Respondent's school district. The State Board determined the Respondent did, in fact, know of the father's residence.

[23]Complaint investigations are required by the federal regulations implementing the Individuals with Disabilities Education Act. See 34 CFR §§300.660-300.662. Such investigations are

had a two-year-old child. The previous school year she had attended a different public school where she received special education and related services for a mild mental handicap. She has not been determined incompetent by a court. She moved in with her sister, who attempted to enroll her in the school district where the sister lived. However, the school refused to enroll her because her parents did not live in the district and the sister had not obtained legal guardianship. The school also stated the student was not emancipated. The school's superintendent asked the sister to provide written explanations as to why the student was not residing with her parents, why the parents were unable to financially support the student, and why the sister was unwilling to seek legal guardianship of the student. After the sister filed a complaint, the school offered to enroll the student if the sister would execute the third-person custodial agreement.[24] The sister stated the student was capable of caring for herself and her child, had not completed high school, and had not been adjudicated incompetent. The student and her sister submitted relevant documentation to the school district, including a notarized statement that the student was living with her sister, and the student would be responsible for paying for rent, utilities, and household expenses. All documentation indicated the student's residence was within the school district where the sister lived.

Although the school relented and enrolled the student, the three-week delay violated special education law. The DOE/DSE recognized the school's right to request relevant documentation, but noted that state law does not permit a school district to refuse enrollment. A school must enroll a student and then proceed to expulsion proceedings, as permitted under I.C. 20-8.1-5.1-11, subject to review by the State Board under I.C. 20-8.1-6.1-10(a)(1). The impermissible delay constituted a denial of a "free appropriate public education" (FAPE). The DOE/DSE also noted the school could not require the third-party custodial form because the student was over 18 years of age, was not adjudicated incompetent, and was considered the "parent" for special education purposes under both federal law (34 CFR §300.20) and state law (511 IAC 7-17-57(5)). Part of the corrective action required consideration of compensatory educational services.

Legal settlement was the principal issue in Complaint No. 1750.01 *(Reconsideration)*. A Seventeen-year-old student receiving special education services in California came to live with her grandmother in Indiana because her mother could no longer care for her. Grandmother attempted to enroll her granddaughter and offered to execute the Third-Party Custodial Form (see IC 20-8.1-6.1-1(c) and *infra*). However, the school stated she must be declared the child's legal guardian by a court before the school would enroll the granddaughter. The student missed three months of school while the grandmother sought such a judicial order. A legal services organization informed her that Indiana law does not require establishment of a legal

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conducted by the Indiana Department of Education through its Division of Special Education and are concerned with alleged violations of federal and state special education laws. See 511 IAC 7-30-2

[24] As discussed *infra*, the custodial forms are intended to assist school districts and parents, guardians, and custodians resolve legal settlement issues. The State Superintendent is required to create such forms. See I.C. 20-8.1-6.1-1(c). The forms are not intended for use with adult students.

guardianship prior to enrollment. Eventually, the legal services organization initiated a complaint investigation. Through the complaint investigation procedure, it was determined the refusal to enroll was not justified and constituted a denial of FAPE. Compensatory educational services were warranted. The school requested reconsideration and was advised that it did not have the authority to condition enrollment on the establishment of a guardianship or the execution of the Third-Party Custodial Form. The grandparent was acting *in loco parentis*, which is specifically recognized under the federal and state definition of "parent." See 34 CFR §300.20 and 511 IAC 7-17-57.

Custodial Forms

Prior to these complaint investigations, the State Board did state definitively that "Indiana law does not permit a public school district to refuse enrollment to a prospective student based solely on a unilateral determination of legal settlement." A public school must first enroll a prospective student and then resort to the statutory requirements under I.C. 20-8.1-5.1-11 to establish whether a prospective student does, in fact, have legal settlement. Such local expulsion decisions are reviewable by the State Board under I.C. 20-8.1-6.1-10(a)(1). See In the Matter of A.A. and the Alexandria Community School Corp., **SBOE Cause No. 0009027 (SBOE 2000)**.

As noted *supra*, I.C. 20-8.1-6.1-1(c) requires the State Superintendent of Public Instruction to create custodial forms to assist public schools and parents, custodians, and guardians in resolving legal settlement disputes. Forms were created for this purpose in 1992 but never revised. Familial relationships and mobility have greatly affected legal settlement understanding over this time, as reflected in various State Board decisions. Accordingly, the Forms have been revised–as have the information sheets explaining their uses–and are included in this document as **Attachment D.** The Forms are also available through the Legal Section of the Indiana Department of Education or on-line at <www.doe.state.in.us/legal/>.

INTERPRETER STANDARDS FOR DEAF AND HARD OF HEARING

In a recent complaint investigation conducted by the Division of Special Education,[25] the Division of Special Education, Indiana Department of Education, revisited a recurring issue: What qualifications are required for interpreters for the deaf and hard of hearing?

The Americans with Disabilities Act of 1990, in 28 C.F.R. Part 35 extending the A.D.A. to state and local government services (Title II), defines a "qualified interpreter" as "an interpreter who is able to interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary." 28 C.F.R. §35.104. In Appendix A to 28 C.F.R. Part 35, the federal government expanded upon its definition, representing that this definition "focuses on the actual ability of the interpreter in a particular interpreting context to facilitate

[25]See *supra* for federal regulatory requirement for such investigations and the equivalent State Board of Education rule.

effective communication between the public entity and the individual with disabilities." The rule "does not invalidate or limit standards for interpreting services of any State or local law that are equal to or more stringent than those imposed by this definition." In short, whether an interpreter is "qualified" is dependent upon the fact situation and not upon licensure, certification, or qualifications for any specific methodology.[26]

Whether an interpreter is "qualified" as been addressed on several occasions through the complaint investigation process. The most recent one is Complaint Investigation No. 1723.01, which involved the question of whether the interpreter was "qualified" because the interpreter was allegedly not sufficiently proficient in ASL. The student was a sixteen-year-old freshman with a hearing impairment. The student's utilizes ASL to communicate, and requires a full-time sign language interpreter. The student's sign language interpreter has a bachelor's degree in ASL and has temporary certification from the Indiana Interpreting Certificate Program (see discussion *infra*). The student's teachers expressed no concerns regarding the student's ability to access information through the interpreter. A person knowledgeable in ASL observed the student's interaction with the assigned interpreter and reported the interpreter used signs that "were comprehensible to an individual dependent on ASL." As a result, the school district was determined to be in compliance with state and federal special education laws, especially as noted in Finding of Fact No. 4: "There are no current Indiana standards for educational interpreters."

But there will be.

In 1996, the Indiana General Assembly created the Board of Interpreter Standards to establish interpreter standards, including ethical standards and grievance procedures for interpreters, as well as an enforcement mechanism. Regulations have been promulgated for this purpose. See 460 I.A.C. 2-3 *et seq.* The stated purpose is to "determine the necessary standards of behavior, competency, and proficiency in sign language and oral interpreting and ensure qualify, professional interpreting services in order to protect the public and persons who are deaf or hard of hearing from misrepresentation." 460 I.A.C. 2-3-1(a). However, the subsection immediately following provides:

> (b) The provisions of this rule will not apply to interpreters while they are interpreting in a public or private primary or secondary school setting. This exception will expire at the earlier of:
>
> (1) the promulgation of educational interpreter standards; or
>
> (2) July 1, 2002.

460 I.A.C. 2-3-1(b). No "educational interpreter standards" have been created, nor have any been proposed. Accordingly, the requirements of 460 I.A.C. 2-3 *et seq.* will apply to school-based interpreters beginning July 1, 2002. Although the regulations do not promote a particular

[26] Although Indiana law does not specify any specific methodology, statute does permit a public school corporation to offer classes in American Sign Language (ASL) for foreign language credit. See I.C. 20-10.1-7-17.

methodology, such as ASL, certification is presently dependent upon a number of different factors, but by July 1, 2007, certification will require a bachelor's degree from an accredited college or university. There is a "grandfather clause" that would permit interpreters certified prior to July 1, 2007, to retain their certification. In any case, certification must be renewed at least every two (2) years. 460 I.A.C. 2-3-3(e). The professional responsibilities range from maintaining confidentiality, avoiding assignments where personal feelings may interfere with correct signing, and employing "the language or mode of communication most readily understood or preferred by all consumers involved," 460 I.A.C. 2-3-6, to transmitting impartially without interjection of personal advice, counsel or opinions and accepting assignments only where the interpreters skill level, the setting, the content and subject matter of the assignment, and the "consumers" involved are within the expertise of the interpreter. 460 I.A.C. 2-3-7, 2-3-8. There are also regulations regarding compensation, professional development, deportment (manner and behavior; appropriate dress), appropriate uses of interpreters, and grievance procedures, which could result in complaints regarding school-based interpreters being filed simultaneously with the Department of Education and the Division of Disability, Aging, and Rehabilitation Services (DARS), the agency within the Family and Social Services Administration (FSSA) responsible for the Board of Interpreter Services.

While the interpreter standards are being phased in for school-based interpreters, there will be situations where a substitute teacher has a class where the teacher was the interpreter as well. In Collier County (Fla.) School District, 27 IDELR 849 (OCR 1997), OCR investigated a complaint that a substitute teacher was insufficiently prepared to sign in ASL. OCR found the school district did not violate Sec. 504 or Title II of the ADA even though the substitute teacher could not provide instruction in ASL, the preferred methodology for this class. The substitute teacher could use basic, functional words through "finger spell signs," such as "sit," "stand," "work," and so on. The substitute also used a microphone to amplify her voice for one student who was hard of hearing. This student assisted the substitute teacher in communicating with the rest of the class. "The comprehension of the students was measured by the papers that the students turned in to the substitute and no problems were noted," OCR determined. In addition, the "objectives of the primary teacher's lesson plans were reached." 27 IDELR at 850.

OCR also noted the school district would be providing training to substitute teachers interested in such classes in order "to develop the skills that will enable them to effectively communicate the instructional goals of the Hearing Impaired Program. The District also plans to place these trained substitutes on a list that will identify them as being able to communicate with the hearing impaired students. Substitute teachers will then be selected based on their ability to effectively communicate the instructional goals of the class." Id.

MEDICATION ADMINISTRATION IN PUBLIC AND PRIVATE SCHOOLS

In this past session of the Indiana General Assembly, the legislature passed Senate Enrolled Act No. 376 (P.L. 264-2001), amending certain portions of Indiana's pupil discipline law, I.C. 20-8.1-5.1 *et seq.*, and the Indiana Tort Claims Act (ITCA), I.C. 34-30-14 *et seq.* The major thrust of the law is to permit a student with an acute or chronic health condition to be able to self-

administer medication prescribed by the student's physician[27] and for which the student has received instruction in the administration. The nature of the student's condition would require emergency administration of the medication. In addition, the parent would have to provide written permission.[28]

The new provisions provide more guidance than necessary legal protections. Existing statutory provisions provide immunity for school employees who, in good faith and who have received training, administer medications to students, including injectable medications. Liability would attach only where the school employee's actions or omissions amounted to "gross negligence or willful and wanton misconduct." See I.C. 34-30-14-2. P.L. 264-2001, Sec. 5, adds I.C. 34-30-14-6 extending the same protection to a school or school board, declaring that there will be no liability for civil damages as a result of any injury to the student through self-administration of medications except where the school's or school board's actions amounted to "gross negligence or willful and wanton misconduct."

In addition to the statutory provisions, the Indiana State Board of Education has a rule specifically addressing the administration of medication to students with disabilities who require special education and related services. The rule, found at 511 IAC 7-21-8, reads as follows:

511 IAC 7-21-8 Medication Administration

(a) The public agency shall establish, maintain, and implement written policies and procedures on the administration of medication that include the following:

(1) No medication shall be administered without the written and dated consent of the parent.

(2) The parent's written consent is valid only for the period specified on the consent form and never longer than the current school or program year.

[27]It is noteworthy that "physician" is defined as an individual licensed to practice medicine or osteopathic medicine under Indiana law "or the law of another state." I.C. 20-8.1-5.1-0.5. This would be particularly helpful in border cities, especially for residents of Indiana counties located in the Chicago area.

[28]There are also provisions for sending home medications that were possessed by the school and for use during school hours or school functions. For student's in grades K-8, such medications can be released only to the student's parent or some other individual who is at least 18 years old and who has been designated in writing by the student's parent to receive the medication. Some schools established a system that has worked well, especially in largely rural areas. The school buses have a type of "lock box" where parents can place medication vials and from which the school can retrieve when the bus reaches its destination. The process works in reverse when the school sends to the parent either empty vials or unused medications. For students in grades 9-12, the school may send home medications with the student if the student's parent provides written permission. I.C. 20-8.1-7-22, as added by P.L. 264-2001, Sec. 4.

(3) A physician's prescription, a copy of the original prescription, or the pharmacy label must be provided by the parent and be on file with the public agency.
(4) Medication shall be maintained in a secure location.
(5) Medication shall be administered in accordance with the physician's prescription.
(6) The parent may, upon request, obtain a copy of the public agency's policies and procedures on medication administration.
(7) If the medication is to be terminated prior to the date on the prescription, the written and dated consent or withdrawal of consent of the parent is required.
(8) The person or persons authorized to administer medication are specified.

(b) The public agency shall document any special training provided to persons authorized to administer medication.

Notwithstanding the above, public schools already had a pre-existing responsibility under certain circumstances to ensure that students with medical needs had access to their medications, including possession of the medications on their persons when medically indicated. Sec. 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990 require reasonable accommodations or modifications in programs, activities, and services provided by public schools where such are necessary for a student or person with a disability to benefit from such programs, services, or activities. This would likely include students with acute or chronic health problems, including students who require injectable medications and blood-sugar testing instruments. While the new Indiana provisions do not necessarily provide any greater legal protection, they do provide a degree of assurance to public schools attempting to balance the medication needs of students with liability issues and the applications of local "zero tolerance" policies regarding drugs. An example of the pre-existing responsibility is included with this publication. See **Attachment E**, which contains a resolution agreement between the Office for Civil Rights (OCR) and an Indiana public school corporation regarding the accommodation of a student's disability (diabetes) and attendant medical needs.

Administration of medications to students while at school has been the core issue in a number of administrative and judicial proceedings. The following are representative.

Student Medications

1. Complaint No. 992-96. This was a complaint investigation conducted under the Individuals with Disabilities Education Act (IDEA), as implemented through 34 CFR §§300.660-300.662 (see 511 IAC 7-30-2) by the Indiana Department of Education, Division of Special Education. The student was in the seventh grade and required medication to control seizure activity. The parent wanted the student to carry and self-administer his medication and did not wish for school personnel to assist him in any way in this respect. The school district medication policy does permit some students to be responsible for the self-administration of medications, but this is based upon the age and

maturity of the student and the severity of the medical condition. Self-administration has to be approved by the student's physician, the parent, and the school official, which could be the school nurse. The investigation results upheld the school district's policy, holding that no student has a right to dictate self-administration of medication while at school. Although the report noted that "A long-range goal for any student on medication is self-sufficiency," a school district can place reasonable restrictions based upon such factors as age, maturity, the seriousness of the medication, the medical involvement of the student, and the safety of other students.

2. Wayne-Westland (MI) Community Schools, 35 IDELR 14 (OCR 2000). The eight-year-old student had an individualized Health Care Plan (HCP) regarding the administration of insulin or glucagon during the school day for her diabetes. The parents and the school began to disagree as to the extent to which the student should self-administer such medications and emergency procedures to be employed. The school and parents resolved their differences when the school agreed to reconvene the Sec. 504 committee to review the HCP of the student upon receipt of a completed Medical Authorization Form and Physician's Order, which would include detailed instructions as to the student's need for insulin or glucagon during the school day. Insulin would be administered by a school nurse or trained staff member, in accordance with the physician's written order; the school will administer the insulin until such time as the student is determined by the Sec. 504 team, the student's parents, and the student's physician to have the skill and comfort level to self-administer her insulin medication; and the glucagon will be administered to the student by the school nurse, as needed in emergency situations, in accordance with the physician's written order.

3. Murfreesboro (Tenn.) City School District, 34 IDELR ¶299 (OCR 2000). The parent kept her daughter, who had asthma, out of school until the school assigned a nurse to the school. OCR found the school's policies were compliant with Sec. 504 and the ADA. The school and the student's physician maintained contact. The physician stated the student did not have an acute medical condition and that non-medical personnel could be trained in the appropriate administration of the student's medications, including the use of the student's nebulizer and the monitoring of the student's airflow readings.

4. Henderson Co. (NC) Pub. Schs., 34 IDELR ¶43 (OCR 2000). The student had juvenile diabetes (Type I) and was enrolled in the elementary school. The school did not develop and implement a health management plan that would have provided the student diabetes-related assistance, including administration of insulin and glucagon injections. The school acknowledged it failed to accommodate the student's condition and agreed to provide training to staff from a registered nurse and other professionals, as appropriate. Staff would also be trained how to observe hypoglycemia (low blood-glucose level) and hyperglycemia (elevated blood-glucose level). The school also agreed to ensure that there would be three full-time staff members at the school trained in the use of an insulin pump, and that there would be at least one person trained in this aspect who would accompany the student to school-sponsored events off-campus.

5. North Kitsap (WA) Sch. Dist. No. 400, 33 IDELR ¶109 (OCR 1999). The student attended the local junior high school. He has Insulin-dependent Diabetes Mellitus and experiences episodes of hypoglycemia, where he may be unresponsive and require injections of glucagon. The school developed an accommodation plan and obtained a "Physician's Order for Medicine at School" from the student's physician, requiring a licensed registered nurse or medical response team member administer injections of glucagon, when necessary. The accommodation plan also required that physical education be scheduled during a time best suited to his condition; altered the lunch schedule as needed; monitored the student's food intake and blood-glucose levels through the school day; provided the student with fast-acting sugars at all times; provided health updates and a copy of the accommodation plan to his teachers and other staff; and provided annual training regarding the emergency management of diabetics. There were also "emergency kits" maintained in several areas of the school, including the student's backpack. These kits contained fast-acting sugars and glucose gel. The physical education teacher also had a two-way radio for use when the class went outside. These procedures, OCR determined, complied with the requirements of Sec. 504 and the ADA.

6. Southwest Vermont Supervisory Union #S, 33 IDLER ¶10 (OCR 1999). The student had asthma. The district developed an "Asthma Action Plan" for her.[29] The school's local policy for the administration of medication requires a written order from a physician detailing the name of the student, the drug dosage, the reason for the administration of medication, and the time the medication is to be administered; medications are to be dispensed by the school nurse or someone trained by the school nurse; and administrations of medication are to be recorded (by time and dosage) and initialed by the school personnel administering same. The student in this case required medication on an "as needed" basis as she was asymptomatic for most of the school year. The student's teacher was to provide verbal and visual cues to the student to prompt her to take her medications. A note with the word "nurse" was taped to the student's desk. This method for making the student more independent was devised by the school nurse and the teacher, and explained to the student's parents, who did not object. (This use of single-word cues was used by the teacher with all of her students as a means of enhancing independence in a variety of areas and not just medication-related.) OCR determined the student was not being treated differently from her peers, and found the school's policies and procedures compliant with federal law.

7. Maine Sch. Administration Dist. #40, 29 IDELR 624 (OCR 1998). Among a host of allegations, the complainant alleged the district failed to notify the student's teachers, substitute teachers, and track coach that the student had a life-threatening allergic

[29]Unlike IDEA where the educational program is fairly standardized under Individualized Education Program (IEP), there is no standard nomenclature for an accommodation plan under Sec. 504 or the ADA. For this reason, the accommodation plan may have many different names, including "Sec. 504 Plan," "Health Care Plan," "Accommodation Plan," or, as in this case, "Asthma Action Plan."

reaction to bee and hornet stings, and to develop an alternative plan for administering an EpiPen shot should the student not be able to self-administer the EpiPen himself.[30] Pursuant to school policy and procedure, the school nurse had placed the student's name on the Confidential Health Alert from that she distributed to all teachers. Included in this form are guidelines for the dispensing of medications to those students known to have allergic reactions to insect bites or bee and hornet stings. The school nurse also provides in-service training to designated school personnel on the use of injectable medications. It was noted the student had an EpiPen with him at all times. The school nurse also maintained an EpiPen in her office in case of an emergency. OCR found these policies and procedures appropriately informed staff of the student's needs and ensured an appropriate contingency plan should there be an emergency.

8. San Juan (Ca) Unified School District, 20 IDELR 549 (OCR 1993). The school district properly evaluated the student's educational needs in light of diagnosed Attention Deficit Hyperactivity Disorder (ADHD), including the identification of dispensing of medication (Ritalin) as a related service. The student, a 13-year-old with a long history of attentional problems and impulse control deficits, was made responsible for ensuring she took her medication as prescribed. There was no plan or process to ensure that the student did so. This constituted a denial of a related service and, hence, a denial of a "free appropriate public education" (FAPE).

9. Pearl (MS) Public School District, 17 EHLR 1004 (OCR 1991). The school district's policy of prohibiting school personnel from administering Ritalin during school hours to students identified as having ADHD violated Sec. 504 of the Rehabilitation Act of 1973.

10. Huntsville City (AL) School District, 25 IDELR 70 (OCR 1996). The school district's medication policy required generally that students with diabetes who needed to use a glucometer to monitor the level of glucose in their blood to come to the office. The school district's medication policy did permit a case-by-case analysis and exceptions where indicated. One student, for example, was medically required to carry her glucometer with her at all times. The Office for Civil Rights (OCR) determined that the school district has not violated Sec. 504 or Title II, Americans with Disabilities Act (A.D.A.).

11. Valerie J. et al. v. Derry Cooperative School District, 771 F.Supp. 483 (D. N.H. 1991). A student's right to a FAPE cannot be premised upon the condition that the student be medicated (Ritalin) without the parents' consent. The parents previously had the student

[30]Insect stings from bees, wasps, hornets, ants and other "biting" arthropods are capable of causing allergic reactions in hypersensitive individuals. An insect sting may cause allergic reactions ranging from relatively trivial symptoms (itchy skin, flushing) to anaphylaxis, a life-threatening reaction where the airway may become swollen, interrupting respiration and sometimes resulting in cardiac arrest. Emergency treatment may mean the difference between life and death. One of the more common emergency self-help treatment kits are the EpiPen, where a dosage of epinephrine, a form of adrenaline, can be injected into the thigh muscle.

on Ritalin, but while the drug "took the edge off" the student's behavior, it left the student spacy, drugged or lethargic with a diminished attention span. The parents became opposed to the use of Ritalin, but the school insisted upon its use as a prerequisite to the student receiving educational services. A hearing officer upheld the school, but the district court found such a prerequisite inconsistent with federal disability laws.

12. Nieuwendorp v. American Family Insurance Co., 529 N.W.2d 594 (Wisc. 1995). The parents of a student with ADHD who was impulsive and aggressive were liable to a teacher for personal injuries when the parents unilaterally removed the student from the medication that was controlling the student's impulsive and aggressive behaviors. The student injured the teacher's neck when he pulled her hair, causing her to fall to the floor. The teacher had been called to the classroom to help control the student's behavior. The parents had not informed the school that they had removed him from his medication nor had the parents informed themselves about the possible behavioral consequences from doing so. Had the school known of the parents' actions, it could have responded by developing a plan to manage the student's behavior. The parents' failure to exercise reasonable care was the proximate cause of the teacher's injuries.

12. In Lubbock (Tex.) Independent School District, 27 IDELR 509 (OCR 1997), the Office for Civil Rights found that the school district's procedures and policies for administering medications did not discriminate against a student with multiple disabilities. School policy required signed parental consent; the provision of medication in the original, labeled container; and, for any changes in dosages, a written order from a physician to the school nurse. The school's individual medication log indicated medication was dispensed to the student when he was in school and that a current, signed consent form was on file. The school nurse and the classroom teacher sent home a letter to the parent requesting clarification regarding a dosage increase. Thereafter, the school nurse contacted the student's physician and pharmacy, and obtained a faxed order from the physician regarding dosage and administration of medication for the student. There was no interruption of service.

Manifestation Determination; Child Find

1. Hacienda La Puente (CA) Unfied Sch. Dist., 30 IDELR 720 (OCR 1998). The student was in the fourth grade but was absent excessively (87 days). The school referred him to the truancy program conducted in conjunction with local law enforcement and social services. In a meeting with school officials and a prosecutor, the parents stated the student had severe asthma and offered copies of doctor office visits, which the prosecutor refused, adding that he needed doctor statements about the student's medical condition and how this affected his school attendance. The parents were provided with a medical release form, but the father did not execute the release so the school could have the medical records. No one suggested the student be evaluated to determine whether he had a disability under Sec. 504 or Title II of the ADA. OCR cited the school for failing "to adequately assess whether [the student's] asthma was a disability under Section 504/Title II. OCR finds that the complainants attributed [the student's] chronic absences to his

asthma and offered documents to support their claim. OCR finds that this information was sufficient under 34 C.F.R. §104.35(a) to require the District to assess whether [the student] had a disability under Section 504. However, the District did not conduct such an assessment." 30 IDELR at 722. "Further, the District acknowledged to OCR that it did not have adequate policies and procedures for the identification, evaluation and placement of students with disabilities under Section 504/Title II." Id. The school district agreed to adopt and implement policies and procedures for the identification, evaluation, and placement of students with disabilities, and further agreed to provide for the assessment of this student's health and conduct other assessments as necessary to determine whether the student has a disability and, if so, whether the disability affected his school attendance.

Liability

1. Nance v. Matthews, 622 So.2d 297 (Ala. 1993). An elementary school student with spina bifida needed to be catheterized at school following bladder surgery. An aide who was trained to catheterize the student failed to do so on one day, allegedly resulting in physical injuries to the student, who sued the aide and school officials for negligence. The court sustained the dismissals from the suit of the school nurse, the principal, and the special education supervisor, finding that they had qualified immunity from charges they negligently supervised and retained the aide. The court stated no qualified immunity would apply where bad faith or fraud is involved, but there was no evidence that such was the case in this dispute. The court did not dismiss the aide from the suit.

Refusal to Administer

1. Ian E. v. Bd. of Education, Unified Sch. Dist. No. 501, Shawnee County, Kansas, 21 IDELR 980 (D. Ks. 1994). The school district refused to administer Clonidine to a student based upon alleged safety concerns, requiring instead that the parents come to school to do so. The parents hired an attorney and requested a hearing. The school reversed itself and agreed to administer the medication. The court found the school liable for the attorney fees the parents incurred in challenging the school's refusal to administer the medication.

2. Davis v. Francis Howell Sch. Dist., 104 F.3d 204 (8th Cir. 1997). The 8th Circuit Court of Appeals determined that a school district in Missouri did not violate the Americans with Disabilities Act when it declined to provide Ritalin in excess of the recommended maximum daily dosage. The student's physician had prescribed 360 milligrams a day of Ritalin to address the student's ADHD. The school nurse administered the medication in school for two years before she noticed the prescription exceeded the maximum daily dosage recommended by the *Physician's Desk Reference.* The school nurse asked the parent to obtain a second physician's opinion regarding the Ritalin dosage. The second doctor wrote that the dosage was safe. Nevertheless, the school nurse declined to provide Ritalin to the student at the dosage prescribed because of concern for the student's health. The school permitted the parent to come to school and provide the medication to her son.

The 8th Circuit panel ruled that the family had not suffered "irreparable harm" by the school's actions.

3. In DeBord v. Bd. of Education of the Ferguson-Florissant Sch. Dist., 126 F.3d 1102 (8th Cir. 1997), the 8th Circuit revisited its decision in Davis v. Francis Howell, *supra*. In this case, the school district's nurse refused to administer an afternoon dosage of Ritalin to an eight-year-old student identified as having Attention Deficit Hyperactivity Disorder (ADHD) because the student's daily intake of Ritalin exceeded by 60 mg the recommended dosage in the PDR. The school declined to accept a waiver of liability from the parents. The court found the school's policy regarding dosages to be neutral and nondiscriminatory. The court also found that the waiver of liability would "impose an undue administrative burden on the school district to verify the safety of an excess dosage in each individual case... At this time, no one knows what the long-term effects of high doses of Ritalin might be. A waiver of liability might not be effective, and statutory immunity might not apply." The school did offer to alter the student's class schedule so the parents could administer the medication. The U.S. Supreme Court has denied certiorari (Case No. 97-1297).

4. Pueblo (CO) Sch. District No. 60, 20 IDELR 1066 (OCR 1993). The school district did not violate Sec. 504 and Title II, A.D.A., when it discontinued the administration of prescription eye drops to a student when the parent failed to produce an updated prescription from the physician. However, OCR noted that the school had continued to provide the eye drops every thirty (30) minutes even though the last prescription was over two (2) years old. The school discontinued the eye drops after the complaint was initiated. This constituted retaliation for engaging in a protected activity (advocating for someone's civil rights), thus violating Sec. 504.

5. East Helena (MT) Elementary School District #9, 29 IDELR 796 (OCR 1998). The school district did not discriminate against a student with asthma when the school nurse refused to administer "medications" prescribed by a Naturopathic Physician & Acupuncturist (ND) or to observe the student while he "self-administered" the medications. "Naturopathy" and its practitioners believe in natural therapeutic substances and are not authorized to prescribe legend drugs, such as those dispensed by pharmacies. An ND creates the concoctions in the ND's office. Under Montana law and directions from the Montana State Department of Nursing, a school nurse is not allowed to take orders from ND's, nor are school nurses to dispense medications unless filled by a pharmacist. The school district did offer to permit family members of the student to come to the school and administer the Naturopathic medications. OCR found the school was abiding by state law, and that its policy was uniformly applied to all students, whether or not there was a disability. OCR also recognized the school's liability and safety concerns with the use of unregulated alternative medicines.

6. Evergreen (WA) School Dist. No. 114, 29 IDELR 983 (OCR 1998). When the school district received conflicting information regarding the administration of medications during school hours of a seven-year-old child with ADHD, the school district requested permission to speak with the student's physician. The parent filed a complaint. OCR

found the school was motivated by safety concerns and was not retaliating against the parent or the student.

Private School Students

Although P.L. 264-2001 addresses only public schools, Sec. 504 does include within its purview private schools that receive federal education funds, although the standards that must be met are not the same as those for public schools. The applicable regulation is as follows.

34 CFR §104.39 Private Education Program

(a) A recipient that operates a private elementary or secondary education program may not, on the basis of handicap, exclude a qualified handicapped person from such program if the person can, with minor adjustments, be provided an appropriate education, as defined in §104.33(b)(1), within the recipient's program.

(b) A recipient to which this section applies may not charge more for the provision of an appropriate education to handicapped persons than to non-handicapped persons except to the extent that any additional charge is justified by a substantial increase in cost to the recipient.

(c) A recipient to which this section applies that operates special education programs shall operate such programs in accordance with the provisions of §§104.35 [evaluation and placement] and 104.36 [procedural safeguards]. Each recipient to which this section applies is subject to the provisions of §§104.34 [least restrictive environment], 104.37 [non-academic, extracurricular activities], and 104.38 [preschool and adult education programs].

Under Sec. 504 and the Americans with Disabilities Act, a non-special education private school that is a recipient of federal financial assistance: (1) may not exclude qualified individuals with disabilities if such individuals can be provided an appropriate education with minor adjustments; (2) may not charge more for that education unless such charges are justified by a substantial increase in cost to the recipient private school; and (3) must operate the private school program in accordance with the provisions of Sec. 504 regulations, which deal with educational setting, evaluation and placement, procedural safeguards, non-academic services, and preschool and adult education programs. Letter to Zirkel, 24 IDELR 733 (OCR 1996).

A private school that receives federal financial assistance is required to provide "minor adjustments" to students with disabilities. This would include accommodations for the administration of medication, albeit not to the same degree as a public school would be required.

Although there is little policy development or case law in this area, Hunt v. St. Peter School, 963 F.Supp. 843 (W.D. Mo. 1997) does provide a specific application of non-discrimination laws to a private school. The student had a severe form of asthma that required her to take a number of

medications and resulted in hospitalizations. She also had allergic reactions to certain scents (perfumes, colognes, strong odors, and diesel fumes) as well as some animals. Oddly enough, the parent resisted providing medical information to the private school. The private school undertook voluntary measures, including a scent-free classroom routine, requiring the teacher not to wear perfume and encouraging the students not to wear perfume or cologne. The parent also conducted in-service training for the student's teachers. The parent demanded a scent-free environment at the school itself, but again refused to share medical information with the school. The student's doctor did tell the school that the student's asthmatic condition could be life-threatening without a scent-free environment. The school could not guarantee a scent-free environment and suggested the parent enroll the student elsewhere. The parent filed suit. The court found the private school was a recipient of federal financial assistance and thus required to abide by §104.39 of Sec. 504. The student has a substantial limitation on a major life activity due to her severe asthma and would be considered a qualified student with a disability under Sec. 504. However, whether or not a student's disability can be reasonably accommodated depends upon the nature of the disability and the ability of the recipient to accommodate such a condition. "By her own doctor's admission, [the student] is at risk of death unless she has a scent-free environment. Absent accommodation, she is not qualified to attend St. Peter. The school has no obligation to continue to provide services to a student who is exposed to an unreasonable risk of danger in the school environment." The court added that private schools, unlike public schools, are required to make "minor adjustments" and not "reasonable accommodations." The school met its "minor adjustment" requirement under Sec. 504 when it instituted its voluntary scent-free policy in the classroom and permitted the student's parent to provide in-service training to school staff.

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Indiana
State Board of Education
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317/232-6622

**BEFORE THE INDIANA
STATE BOARD OF EDUCATION**

M. A., Petitioner	)	
and	)	
School City of Whiting, Respondent	)	**CAUSE NO. 9911026**
Right to Attend School under I.C. 20-8.1-6.1-10(a)(3)(C)	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDERS

This is a dispute involving a solitary issue:

> Does an Indiana public school corporation have the right to deny enrollment of a prospective student solely because the prospective student is over the age of 18 years?

Procedural History

The instant matter was initiated on November 5, 1999, when M. A., the Petitioner herein, through her older brother, requested the Indiana State Board of Education to review the decision of the School City of Whiting, the Respondent herein, denying her enrollment based upon the fact she was over the age of 18 years. Petitioner referred to correspondence from the school in her request for a hearing, but did not supply same. A Hearing Examiner was appointed on November 8, 1999, pursuant to I.C. 20-8.1-6.1-10(b)(6). Petitioner supplied the requested documentation on December 7, 1999. A hearing date was established for January 20, 2000, but was continued due to inclement weather. The hearing was rescheduled for February 25, 2000, in Indianapolis, after securing from the parties dates that they would be available.

On February 11, 2000, the Respondent filed a "Petition for a Change of Hearing Examiner," asserting the site for the hearing was inconvenient for the Respondent and posed an imposition. On February 15, 2000, the Hearing Examiner denied the "Petition for a Change of Hearing Examiner." In the Order denying the Respondent's motion, the Hearing Examiner included the following:

> Having denied the Motions, the parties are provided the following directions.
>
> 1. At present, the only scenario before the Hearing Examiner is that Petitioner presented herself for enrollment but the Respondent declined to enroll her due to her age (19 years of age). Based on the request for a hearing, Petitioner asserts she does not have a high school diploma and has legal settlement in the Respondent's school district.
>
> 2. The Hearing Examiner presumes the Respondent has some reason or reasons for denying enrollment to Petitioner, but such reasons have not been presented at yet. It is presumed that the reasons are for other than stated in rhetorical paragraph 1. No documentation of correspondence from Respondent to Petitioner has yet been entered into the record.
>
> With this in mind, the following are options for the parties if they wish to avoid a hearing:
>
> 1. Respondent can enroll Petitioner, who would then withdraw her hearing request.
>
> 2. Respondent and Petitioner can submit to the Hearing Examiner a list of agreed-upon (stipulated) facts, including agreed-upon documentation between the parties, and ask the Hearing Examiner to fashion a recommended decision to the State Board of Education based upon the stipulated facts. The parties have to agree that the facts submitted, including documentation, are not in dispute.
>
> 3. If the parties chose Option No. 2, both parties can submit a written statement as to how the particular party believes the stipulated facts support their respective position. Neither party is required to do so, but the opportunity is present.
>
> 4. If Option No. 2 is chosen, the Respondent is to prepare the stipulated facts and send same, along with any additional documentation, to the Hearing Examiner, first by facsimile transmission at (317) 232-0744 with originals to follow by regular U.S. Mail.
> 5. Upon receipt of the stipulated facts and documentation, if any, the hearing date will be vacated. A recommended decision will be fashioned for

consideration by the State Board of Education. A party disagreeing with the recommended decision of the Hearing Examiner has the right to appeal to the State Board and present oral argument at the State Board's next scheduled meeting. The State Board conducts its meetings in Indianapolis.

The Hearing Examiner did not receive any stipulated facts from the parties. As a consequence, a hearing was conducted in Indianapolis on February 25, 2000. Petitioner appeared in person and by her older brother. Respondent appeared in the person of its superintendent and by counsel, Joseph L. Curosh. A brief pre-hearing was conducted, during which the Hearing Examiner learned that there were no disputed facts and that the Respondent denied enrollment solely because Petitioner was over the age of 18 years. Respondent then presented its "Verified Motion to Dismiss for Lack of Jurisdiction," which argues, essentially, that the State Board only has jurisdiction to determine a person's right to attend school when the person is of compulsory school age for attendance (between the ages of 7 and 18 years of age), and has no authority to determine any person's right to attend school if such a person is not of compulsory school age. Based on this argument, the Respondent asserts that the State Board has jurisdiction only to dismiss the case, and any other action by the State Board would be a nullity.

The Hearing Examiner received argument from Respondent regarding its Motion and allowed Petitioner an opportunity to respond. Following same, the Hearing Examiner took the Motion under advisement, ensured that there was no dispute as to the essential facts in this case, and advised the parties of the procedures that would be followed, including any administrative appeal rights to the State Board.

Based upon the foregoing, the documentation received into the record without objection, and the agreed-upon facts, the following Findings of Fact are determined.

Findings of Fact

1. Petitioner is over the age of 18 years of age. Her birth date is July 4, 1980.

2. Petitioner last attended school in Mexico during 1998. She has not earned a high school diploma.

3. Petitioner, at all times relevant herein, resides with her brother within the school boundaries of the Respondent. Respondent does not challenge her legal settlement.

4. At the beginning of the 1999-2000 school year, Petitioner sought to enroll in Respondent's schools. The principal of Whiting High School denied her enrollment because she was over the age of 18 years of age. Petitioner appealed to Respondent's

superintendent to reconsider the principal's position. However, by letter dated September 15, 1999, the Respondent denied her enrollment because she was not of compulsory school age.

5. Respondent's superintendent acknowledges that the current high school population does have some students who are the same age as Petitioner.

Discussion

Although this is a question of first impression for the State Board of Education, this does not mean that the issue is a novel one or an unresolved question of law. The Indiana Attorney General, in an official opinion to the then-State Superintendent of Public Instruction regarding whether an Indiana public school can deny enrollment to a married student over the age of 21 years of age, answered that, under Indiana's Constitution, "school officials cannot by a general rule, or ordinance, exclude from the public schools of this State married pupils, or those over twenty-one (21) years of age, otherwise eligible to attend such schools." 1944 **Ind. Attny. Gen. Op. 87**, p. 389. The Attorney General began his analysis by referring to Art. 8, §1 of the Indiana Constitution:

> Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, *and equally open to all*. (Emphasis by the Attorney General.)

Id., at 387. The Constitution does not contain an age limitation, nor does it restrict the constitutional right to receive an education based solely upon one's status as a "child." Reasonable restrictions can be placed upon school attendance for designated periods of time due to misconduct or the presence of a health condition that poses a risk to the student or other students. The Attorney General concluded that there is no authority for a school "...to exclude pupils over twenty-one (21) years of age from attending such schools."[31] Id., at 389.

The Indiana Department of Education, through numerous publications and presentations for many years, has reiterated this position and explained its consequences, including when the right to an education under the constitution has been satisfied (upon receipt of a high school diploma). Materials disseminated to all public school corporations regarding the requirement that students pass the graduation qualification examination (GQE) under I.C. 20-10.1-16-13 or otherwise satisfy this requirement as a prerequisite to graduation underscore a student who is unsuccessful

[31]The term "Common Schools" as used in Article 8 is synonymous with "public schools" and includes high schools. Chandler v. South Bend Community School Corporation, 312 N.E.2d 915 (Ind. 1974).

in this endeavor "is entitled to continue to receive educational services until graduation requirements are met." See, for example, **General Questions and Answers: ISTEP+** , p. 5, disseminated to all public school superintendents in June 1997.[32]

Respondent significantly misreads the statutory provisions. While I.C. 20-8.1-3 *et seq.* does, indeed, refer to compulsory school attendance, these statutory provisions address one's *obligation* to attend school, not one's *right* to attend school. I.C. 20-8.1-3-2, upon which Respondent's argument relies, is restricted to that *Chapter* (i.e., I.C. 20-8.1-3 *et seq.*) and not all of *Title* 20, much less *Article* 8.1. The General Assembly conferred upon the Indiana State Board of Education the responsibility to determine the "right to attend school in any school corporation" upon "the timely written application of any interested party." I.C. 20-8.1-6.1-10(a)(3)(C). For the purposes of I.C. 20-8.1, the term "student" refers to "any person enrolled in a public school corporation." I.C. 20-8.1-1-3.5.[33] There are no specific age limitations placed upon this operative term. The phrase "right to attend school" and other operative definitions are clear and unambiguous in that the General Assembly intended the State Board to resolve such matters for any prospective "student." The restrictive reading Respondent urges would be "plainly repugnant to the intent of the legislature or of the context of the statute" in question. I.C. 1-1-4-1.

The Indiana Attorney General's opinion was sought by the State Superintendent of Public Instruction on a matter within the purview of that office's responsibilities. The Attorney General had the authority to issue his opinion as to the constitutionality of Art. 8, §1, as provided by I.C. 4-6-2-5. An Indiana public school corporation cannot avoid the implications and import of this opinion.

Although Indiana's constitution permits a person to "attend school" irrespective of the person's age, this does not necessarily mean that a person of any age has a right to be inserted into a typical high school setting. To "attend school" is a somewhat flexible concept. See I.C. 20-8.1-1-7.2. For certain adult students who have not yet attained their high school diplomas, an Indiana public school corporation could provide educational opportunities through adult education classes, either provided by the public school corporation, provided cooperatively with

---

[32]The constitutional provisions, likewise, do not distinguish among categories of persons entitled to a public education without charge of tuition, nor have any materials disseminated by the Indiana Department of Education or the State Board of Education done so. Students with disabilities are entitled to the same opportunity to attend school until they complete high school graduation requirements (receive a high school diploma), irrespective of the fact such students may be over the age of 18 years of age. Evans v. Tuttle, 613 N.E.2d 854 (Ind. App. 1993). See also the Indiana State Board of Education's regulation at 511 IAC 7-4-1(b). Indiana statutory provisions specifically require that students, regardless of race, creed, national origin, color or sex have the same equal educational opportunities. See I.C. 20-8.1-2 *et seq.*

[33]Some older statutes make references to "children," but the term is not otherwise defined. A literal application of the term "children" (i.e., anyone under the age of 18 years of age) in determining public school enrollment would be unconstitutional. See the Attorney General's Opinion No. 87 (1944), *supra*.

other public school corporations, or by payment of tuition to another public school corporation for one of its students to attend. Under any situation, the right to attend school is also the right to attend tuition free. Where Petitioner herein may attend is not in issue; her right to attend school is the issue.

Conclusions of Law

1. The Indiana State Board of Education has jurisdiction, under I.C. 20-8.1-6.1-10(a)(3)(C), to determine the Petitioner's right to attend school in a public school corporation.

2. Petitioner has legal settlement within the school boundaries of the Respondent and does not presently have a high school diploma. Petitioner has the right to attend school in Respondent's school district.

Orders

1. Respondent's "Verified Motion to Dismiss for Lack of Jurisdiction" is denied.

2. Respondent shall immediately enroll Petitioner and permit her to attend school.

Date: March 2, 2000 /s/ Kevin C. McDowell, Hearing Examiner

ACTION BY THE INDIANA STATE BOARD OF EDUCATION

The Indiana State Board of Education, at its meeting of April 13, 2000, following oral argument by the Respondent and discussion, upheld the decision of the Hearing Examiner by a 9-1 vote.

Appeal Right

Any party aggrieved by the decision of the Indiana State Board of Education has thirty (30) calendar days from the receipt of this decision to seek judicial review in a civil court with jurisdiction, as provided by I.C. 20-8.1-6.1-10(e).

Indiana
State Board of Education
Room 229, State House • Indianapolis, Indiana 46204-2798
317/232-6622

**BEFORE THE INDIANA
STATE BOARD OF EDUCATION**

In the Matter of N. A. S.	)	
Petitioner	)	
	)	
and	)	
	)	**CAUSE NO. 0009028**
Fort Wayne Community Schools,	)	
Respondent	)	
	)	
Appeal from an Expulsion for the Lack of Legal Settlement I.C. 20-8.1-6.1-10(a)(1)	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDERS

Introduction

Although this hearing is framed generally as an appeal from an expulsion for lack of legal settlement, there are attendant issues that also must be addressed, including the application of the "emancipation" standards under I.C. 20-8.1-6.1-1(d), the appropriateness of the procedures employed by the Respondent in determining whether Petitioner is emancipated for the purposes of attending school tuition free, and the need to re-establish safeguards that would ensure continuing educational services for students expelled for lack of legal settlement by local public school districts until appeal to the State Board of Education has been completed. The State Board of Education has jurisdiction to decide all matters in this case except the last issue, which would have to be addressed by the Indiana General Assembly, as noted below. There is, at present, no mechanism to place aggrieved petitioners back to the position where they should have been when, as in this case, a public school district expels for lack of legal settlement without legal justification for doing so.

Procedural History

Petitioner is over the age of eighteen years. He has not completed his secondary education. He previously attended school in a neighboring public school district, during which time he lived with his grandparents, who were his legal guardians. Petitioner moved into a residence that is located within Respondent's school district, executed a lease, opened a checking account, obtained a credit card and video club membership, and obtained part-time employment. Petitioner enrolled in Respondent's school district with the intention of completing his high school education. Respondent requested Petitioner to supply certain documents indicating his legal settlement, especially with respect to his purported emancipation. Petitioner supplied all requested documentation and also submitted an executed third-party custodial form. Nevertheless, Respondent determined he was not emancipated and so informed Petitioner by letter dated September 3, 2000. An expulsion meeting, pursuant to I.C. 20-8.1-5.1-11, was conducted by Respondent on September 12, 2000. A written decision was issued thereafter, although the decision does not have an issuing date. A notice of "Appeal Rights" indicates it was mailed on September 14, 2000.[34]

The local Expulsion Examiner determined that Petitioner's grandparents, with whom he had lived since he was a child, were his legal guardians. The grandparents live in the boundaries of the South Adams Community School Corporation. Petitioner's biological father lives in Berne, Indiana, which would also be within the South Adams Community School Corporation. However, the biological father has had little contact and provided no support for Petitioner. The grandparents apparently never initiated any legal proceedings to formalize the guardianship relationship. The South Adams Community School Corporation considered the grandparents to

[34]The issuing date was a matter of some disagreement, principally because the Respondent's "Appeal Rights" statement contained erroneous information, to wit: "A request for appeal must be: (1) in writing; and (2) delivered in person or by certified mail within 10 calendar days of **September 14, 2000,** [emphasis original] which is the date this notice was mailed." The following also appeared: "IF YOU DO NOT REQUEST AN APPEAL WITHIN TEN (10) CALENDAR DAYS OF THE DATE THIS NOTICE OF ACTION WAS MAILED, ALL ADMINISTRATIVE RIGHTS TO CONTEST AND APPEAL THE DISCIPLINE ACTION TAKEN ARE GIVEN UP OR WAIVED." The Hearing Examiner informed the parties in his Notice of Appointment that this statement is an incorrect statement of the law. The State Board of Education calculates the passage of time not from the mailing but from the receipt of legal documents. In addition, there is no ten-day timeline for initiating appeals from expulsions for lack of legal settlement. The waiver language is without legal basis. Although the expulsion proceedings for lack of legal settlement are found within the pupil discipline statutory provisions, I.C. 20-8.1-5.1 *et seq.*, these proceedings are not disciplinary in nature. A petitioner does not waive the right to request review by the Indiana State Board of Education–or initiate a separate request under "Right to Attend School"–by failing to act within the timeline described in Respondent's statement of appeal rights.

be Petitioner's legal guardians while Petitioner attended its schools. The written decision of the local Expulsion Examiner, upholding the Respondent's determination that Petitioner was not emancipated and did not have legal settlement, contains few relevant facts but is more a series of short, conclusory statements without any discernible factual bases.

The Petitioner initiated on September 27, 2000, an appeal to the Indiana State Board of Education of the expulsion, as provided by I.C. 20-8.1-6.1-10(a)(1). The undersigned was appointed Hearing Examiner the following date. The Hearing Examiner, through a Notice of Appointment dated September 28, 2000, advised the parties of the appointment, provided preliminary instructions on certain hearing rights, and advised the parties that the appeal statement provided by the Respondent was incorrect. Thereafter, available dates for a hearing were secured from the parties. A hearing date was set for October 31, 2000. The parties were mailed on October 11, 2000, a formal Notice of Review Hearing, advising of the date, time, and place for the hearing and also further advising them of their specific hearing rights.

The parties appeared for the hearing on October 31, 2000. Petitioner appeared in person and was accompanied by his landlord and a friend. Respondent appeared by counsel and director of student services. Petitioner tendered additional documentation, as did Respondent. Neither party objected to the admission of such documents. Based upon the testimony and documentary evidence that constitute the record in this matter, the following Findings of Fact and Conclusions of Law are determined.[35]

FINDINGS OF FACT

1. Petitioner is over the age of eighteen (18) years of age. Although Petitioner's exact age was never established, neither party contested that he is over the age of eighteen (18) years of age. Petitioner is competent to handle his own affairs, and Respondent does not challenge his capacity to enter into contractual agreements on his own behalf.

2. Prior to the beginning of the 2000-2001 school year, Petitioner lived in a neighboring school district with his grandparents, who were his legal guardians and regarded as such. Petitioner attended school through his junior year in the neighboring school district.

3. In July of 2000, Petitioner moved into a residence that is located within the boundaries of the Respondent. He executed a standard one-year Lease Agreement that required a rent of $1.00 per year, although Petitioner was responsible for his own clothing, food, other personal items, and some utility expenses. Respondent acknowledges that the Lease Agreement is a legally binding document.

[35]The written decision of the local expulsion examiner, as noted *supra*, lacks sufficient fact finding. As a result, it is necessary for the State Board of Education to determine factual findings necessary to reach legal conclusions. No deference need be shown to the locally derived decision.

4. Petitioner obtained part-time work (approximately 20 hours a week) and has been earning a pay check and paying taxes. Petitioner supplied to Respondent, as Respondent's request, a letter certifying his employment and copies of his pay stubs.

5. Petitioner opened a credit card account and supplied Respondent, at Respondent's request, with documentation regarding the credit card account. The credit card account, as the Lease Agreement, indicate Petitioner's address to be within Respondent's boundaries.

6. Petitioner opened a banking account and supplied Respondent, upon Respondent's request, copies of documents (blank checks) indicating an account had been opened and showing an address within the boundaries of the Respondent.

7. Petitioner joined a local video club and supplied Respondent, upon Respondent's request, with documentation in the form of an identification card demonstrating membership.

8. Petitioner registered to vote. His voter registration card indicates an address within the boundaries of the Respondent.

9. Respondent stated that for a student to be emancipated, he must be "totally self-supporting."[36] Although Respondent acknowledges the Lease Agreement is a legally binding document, and further acknowledges that there are such Lease Agreements between and among commercial entities and that he was aware of same, Respondent does not believe the rental charge of $1.00 a year is a reasonable rent. Respondent further added that, although Petitioner is employed, "if he were paying reasonable rent, he would not be totally self-supporting," and, in Respondent's estimation, would require support from a legal guardian.

10. Respondent acknowledges that it requested of Petitioner evidence of his lease agreement, employment status, checking account, credit card account, and similar documents but never advised Petitioner what Respondent considered to be reasonable rent, sufficient employment, sufficient banking accounts, or other indices it employs in assessing emancipation. Respondent did not provide any such information during the hearing in this matter. Respondent, through its director of student services, indicated that such assessments are matters of his "professional judgment."

11. Respondent indicated that it does consider hardship cases, but the method for doing so was not articulated. Upon inquiry by the Hearing Examiner, Respondent stated that any person who moves into its district that is not "totally self-supporting" would not be considered emancipated and would be denied enrollment. The Hearing Examiner posed the following scenario for director of student services: If an 18-year-old student with a

[36]Respondent, through its director of student services, made this assertion four (4) different times during his testimony. The Hearing Examiner questioned him on this point, but Respondent maintained that a student, to be emancipated, must be "totally self-supporting."

child moves to live with someone in the Respondent's district but has no employment, no checking account, and is surviving with public assistance, would this person be permitted to enroll in Respondent's district? Respondent responded in the negative, indicating that the person would not be "totally self-supporting" and would, as a result, not be emancipated such that this person could attend Respondent's schools.

CONCLUSIONS OF LAW

1. Petitioner has not yet received a high school diploma. He wishes to continue his education in Indiana's public school system. He has requested a hearing under I.C. 20-8.1-6.1-10(a)(1) to challenge the decision of Respondent to expel him for lack of legal settlement based upon Respondent's assessment of what constitutes "emancipation." The Indiana State Board of Education has the responsibility to review such appeals and to determine a student's right to attend school in any Indiana public school corporation. Accordingly, the State Board of Education has jurisdiction in this matter.

2. Under I.C. 20-8.1-6.1-1(d), a student will be considered emancipated for legal settlement purposes when the student:
   a. Furnishes the student's support from the student's own resources;
   2. Is not dependent in any material way on the student's parents for support;
   3. Files or is required by applicable law to file a separate tax return; and
   4. Maintains a residence separate from that of the student's parents.

3. Petitioner is over the age of eighteen (18) years of age and is competent. Although his grandparents would meet the definition of "parent" under I.C. 20-8.1-1-3, Petitioner does not reside with them and is not dependent in any material way on them for his support. Petitioner's biological parent is likewise not providing for Petitioner's support and was not considered by the neighboring school district to be Petitioner's "parent." It is not disputed that Petitioner is maintaining a residence separate from his parents' residence. Petitioner is employed and is paying applicable employment-related taxes. He has entered into a standard Lease Agreement that Respondent does not challenge as to its legality. Petitioner is responsible for his food, clothing, and some utility expenses.

4. Under Article 8, §1 of the Indiana Constitution, the duty to establish "a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all" is placed upon the General Assembly. The General Assembly has the sole power to determine how and by what instrumentalities Indiana's common school[37] system is to be administered. Keller v. Reynard, 223 N.E.2d 774 (Ind. App. 1967). Statutory enactments passed under this constitutional authority are to be liberally construed for the encouragement of knowledge and learning. Patterson v. Middle Sch. Township, 98 N.E. 440 (Ind. App. 1912).

[37]"Common Schools" is synonymous with "public schools" and includes high schools. Chandler v. South Bend Comm. Schs., 312 N.E.2d 915 (Ind. App.1974).

5. The General Assembly, by statute, requires all Indiana public schools to be open to students until "they complete their course of study, subject to the authority vested in school officials by law." I.C. 20-8.1-2-2. When constructing the meaning of a statutory provision, a general rubric is to ensure that any construction is not "plainly repugnant to the intent of the legislature or of the context of the statute." I.C. 1-1-4-1. The General Assembly enacted I.C. 20-8.1-6.1-1 as a means for determining the "legal settlement" of a student. In accordance with the above, the legislative intent must be analyzed in the positive (ensuring that public schools are open to all until a course of study is completed) rather than in the negative (creating impediments to access to the public schools). The legal settlement of a student is important, but the language of the statute allows for numerous situations where legal settlement can occur, with a tacit acknowledgment that not all circumstances can be encompassed. Hence, the creation of the custodial forms under I.C. 20-8.1-6.1-1(c), the vesting of jurisdiction with juvenile courts in some situations under I.C. 20-8.1-6.1-1(a)(8), and similar circumstances recognizing divorce, abandonment, and emancipation.

6. Without regard to the question of emancipation and accepting Respondent's legal analysis, Petitioner would have "legal settlement" under I.C. 20-8.1-6.1-1(a)(3) in that "the student is being supported by, cared for by, and living with some other person" such that the legal settlement of the student would be that person's residence, absent a showing that such an arrangement was created "primarily for the purpose of attending school in the attendance area where the other person resides." Respondent does not allege, and did not make any findings through its expulsion process, that Petitioner herein was placed by his grandparents with the landlord primarily for the purpose of attending Respondent's school.

7. Respondent's interpretation of the emancipation portion of the legal settlement statute is "plainly repugnant to the intent of the legislature" especially in consideration of the context of the legal statute as a whole, which would find the Petitioner had legal settlement if *not* emancipated. The General Assembly could not have meant to create unequal standards. In addition, Respondent either has no clear criteria other than subjective "professional judgment"or, in some instances noted *infra* suspect criteria, for assessing emancipation. Such subjectivity is, by its very nature, arbitrary and capricious, placing Petitioner and anyone else similarly situated in a no-win situation that is manifestly unfair and contrary to law. As statutory enactments passed under constitutional authority are to be liberally construed for the encouragement of knowledge and learning, Patterson v. Middle Sch. Township, *supra*, Respondent's construction of what constitutes emancipation for legal settlement purposes is doing just the opposite.

8. I.C. 20-8.1-6.1-1(d) by a plain reading of its language does not require a student who is emancipated to be "totally self-supporting." The statute refers to the student providing support "from the student's own resources." There is no additional qualification that such support be "total," a concept that defies definition much less legal analysis. The

Respondent's reliance on such a standard is misplaced and contrary to the law. The record supports the conclusion that the Petitioner is providing support from his own resources, which would include his own resourcefulness. The Lease Agreement is, as Respondent acknowledges, a legally binding document. The fact that the terms are favorable to Petitioner is of no consequence in assessing the emancipation status of Petitioner.

9. There is no evidence to demonstrate that Petitioner is dependent for support in any material way upon his parents, as that term is defined.

10. Petitioner is employed and paying applicable employment-related taxes. The fact that Petitioner has not filed a tax return or may not be required to file a tax return due to his income is not a determining factor. A rational reading of this provision would relate to the issue of "support." If a parent continues to claim a student as a dependent on tax returns the parent files, there is a *bona fide* issue regarding emancipation because there is a presumption that the parent is providing the type of support for the student that would militate against a finding of emancipation. Respondent did not establish in its local hearing process that the grandparents or the biological father claimed Petitioner as a dependent on their respective tax returns. Additionally, the actual filing of a tax return by a student is not a determining or defeating factor, but part of a fact-analysis on a case-by-case basis. In the hypothetical posed to the Respondent, the 18-year-old mother who lives with someone else and is dependent upon public assistance may very well be considered "emancipated" for the purpose of determining legal settlement. A contrary finding would be "plainly repugnant."

11. It is not disputed by Respondent that Petitioner maintains a residence separate from that of the Petitioner's parents, as that term is defined. Respondent complains of the favorable rental terms in the Lease Agreement, but this aspect of the Respondent's argument is immaterial in this analysis.

12. The term "residence," "resides," or comparable language when employed with respect to "legal settlement" means a "permanent and principal habitation that a person uses for a home for a fixed or indefinite period, at which the person remains when not called elsewhere for work, studies, recreation, or other temporary or special purpose." I.C. 20-8.1-6.1-1(b). Petitioner has established a "residence" for a fixed period of time, as determined by the Lease Agreement. All testimony indicates that this is Petitioner's "home." The residence is within the boundaries of the Respondent. Petitioner has legal settlement within the boundaries of the Respondent's school district.

13. Petitioner has satisfied the requirements of I.C. 20-8.1-6.1-1(d). He is emancipated for the purpose of determining legal settlement.

DISCUSSION

Although the Hearing Examiner has determined the Petitioner is emancipated and does have legal settlement within the boundaries of the Respondent, this does not place the Petitioner back in the position he would have been but for the Respondent's expulsion of him based upon suspect criteria and subjective impressions described as "professional judgment." By the time the State Board completes this adjudication, the Petitioner will not have been allowed to attend school for a complete semester during what should have been his senior year. Prior to the 1995 session of the General Assembly, Indiana law referred to disputes over legal settlement as "exclusions" rather than "expulsions," which prevented some of the confusion that apparently occurred here, judging from the typical discipline-based expulsion verbiage in the appeal statement the Respondent provided Petitioner. Under the former statutory provision at I.C. 20-8.1-5-5(2), an exclusion from school for lack of legal settlement was not "effective until the student's right to attend a public school of another school corporation has been established in accord with this subdivision. Another school corporation which is asserted to be the student's legal settlement, if known, and any governmental entity which it is asserted is obligated to pay the transfer tuition for the student, shall be made a party to the hearing. Appeals involving exclusion under this subdivision may not be taken to court, but to the state board of education which shall determine the question of exclusion, and the school corporation in which the student is entitled to attend school in accord with the procedures set out in IC 20-8.1-6.1-10." The statute not only provided a "stay put" provision until legal settlement was determined by the State Board but advised parties of the right to request appeal to the State Board. When the General Assembly repealed IC 20-8.1-5 through P.L. 131-95, it changed the exclusion process to an expulsion process, removed the "stay put" provision, removed the requirement to make some determination of where the student should be attending school,[38] and the coordinating language advising of the appeal right to the State Board was removed although the right to appeal remained, albeit in a later and unrelated statute.

The State Board may wish to consider recommending to the General Assembly that elements of the previous law be restored in order to ensure more equitable access to publicly funded education. In this situation, Petitioner has lost a great deal. Had the Respondent been required to enroll Petitioner while the State Board appeal process was exhausted and the decision rendered had been in Respondent's favor, Respondent would have the right to seek the payment of transfer tuition from the Petitioner. The current law works a hardship on students such as Petitioner.

ORDERS

1. Respondent's determination that Petitioner does not have legal settlement in its district is reversed.

[38] "This issue is not present in this case. Respondent did make a legal determination that Petitioner's legal settlement is in another Indiana public school corporation. However, the State Board has had other legal settlement disputes where no other Indiana public school corporation had been identified as having the responsibility for providing educational services tuition-free to a student. In one case, the student, a ward of the state who had been placed in multiple foster homes, had no legal settlement in any public school district.

2. Petitioner has established legal settlement within the boundaries of the Respondent and has the right to attend school tuition free.

3. Petitioner is considered emancipated for the purpose of determining legal settlement.

DATE: November 15, 2000 /s/ Kevin C. McDowell
Kevin C. McDowell, Hearing Examiner

ACTION BY THE INDIANA STATE BOARD OF EDUCATION

The Indiana State Board of Education, at its meeting of December 7, 2000, adopted the decision of the Hearing Examiner as a part of its consent agenda.

APPEAL RIGHT

Any party aggrieved by the decision of the Indiana State Board of Education has thirty (30) calendar days from receipt of this decision to seek judicial review in a civil court with jurisdiction, as provided by I.C. 20-8.1-6.1-10(e).

Indiana
State Board of Education
Room 229, State House • Indianapolis, Indiana 46204-2798
317/232-6622

BEFORE THE INDIANA
STATE BOARD OF EDUCATION

In Re the Matter of S.M., II	)	
	)	**Cause No.: 0101001**
Appeal of Expulsion Pursuant	)	
to I.C. 20-8.1-5.1-11	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Procedural History

Petitioner is over eighteen years of age. He has not completed his secondary education. Petitioner previously attended school in Respondent's school district while he resided with his father. Pursuant to his parents' divorce decree, his father was granted custody of Petitioner. Through an informal agreement between Petitioner's parents, Petitioner resided with his mother for the past two years and attended school in Kentucky. In September, 2000, Petitioner moved into a residence that is located within Respondent's school district with the intention of completing his high school education. Although Petitioner attempted to enroll in Respondent's school corporation in September, Respondent did not permit Petitioner to enroll until November 6, 2000. Petitioner provided Respondent with requested documentation. Respondent determined Petitioner was not emancipated, and on November 7, 2000, filed a written charge and request for expulsion. An expulsion meeting, pursuant to I.C. 20-8.1-5.1-11, was conducted by Respondent on November 30, 2000. A written decision was issued on December 22, 2000.[39]

[39]The hearing officer notes that the written decision contained the following information within its "Appeal Rights" statement: "IF YOU DO NO REQUEST AN APPEAL WITHIN TEN (10) CALENDAR DAYS OF THE DATE THIS NOTICE OF ACTION WAS MAILED, ALL ADMINISTRATIVE RIGHTS TO CONTEST AND APPEAL THE DISCIPLINE ACTION

The local Expulsion Examiner determined Petitioner does not meet the requirements for being emancipated and that his legal settlement is not within Respondent's attendance area but with Petitioner's mother in Hawaii. The written decision of the local Expulsion Examiner, upholding the Respondent's determination that Petitioner was not emancipated and did not have legal settlement, contains few relevant facts, but is more a series of conclusory statements without any discernible factual bases.[40] The summary of the testimony omits relevant statements and contains some statements wholly unsupported by and contrary to the testimony.

On January 3, 2001, the Indiana State Board of Education received Petitioner's request to appeal the local school's determination that Petitioner be expelled due to lack of legal settlement. The undersigned was appointed as hearing officer for the ISBOE and requested the parties notify her of available dates for a hearing. The hearing was subsequently scheduled for February 16, 2001. Petitioner was present in person and Tamara Thayer was present as a witness for Petitioner. The school was represented by counsel, Georgia L. Hartman. Testimony was heard and evidence was admitted.[41]

TAKEN ARE GIVEN UP OR WAIVED." Respondent has previously been notified that this is an incorrect statement of the law. See *In the Matter of N. A. S and Fort Wayne Community Schools*, Cause No. 0009028 (SBOE 2000), wherein the hearing examiner, in referring to this language noted:

> The Hearing Examiner informed the parties in his Notice of Appointment that this statement is an incorrect statement of the law. The State Board of Education calculates the passage of time not from the mailing but from the receipt of legal documents. In addition, there is no ten-day timeline for initiating appeals from expulsions for lack of legal settlement. The waiver language is without legal basis. Although the expulsion proceedings for lack of legal settlement are found within the pupil discipline statutory provisions, I.C. 20-8.1-5.1 *et seq.*, these proceedings are not disciplinary in nature. A petitioner does not waive the right to request review by the Indiana State Board of Education–or initiate a separate request under "Right to Attend School"– by failing to act within the timeline described in Respondent's statement of appeal rights.

[40]Having concluded Petitioner was not emancipated, the Expulsion Examiner then determined Petitioner had legal settlement where his mother resided–in Hawaii. However, there are no facts to show Petitioner's mother was granted custody by the court, or that Petitioner's parents agreed Petitioner would reside with his mother for the 2000-2001 school year. The testimony showed that pursuant to court order, Petitioner's father had custody, and his parents agreed, on an annual basis, that Petitioner would reside with his mother in Kentucky for the 1998-1999 and 1999-2000 school years.

[41]The evidence, admitted without objection, consisted primarily of documents which had previously been submitted at the local school hearing. Documents which had not been previously admitted as part of the record were pay stubs and bank records dated after the date of the local hearing. These documents were not available at the time of the local hearing, and were submitted for the purpose of showing Petitioner was still employed and still maintained his bank account.

After a review of the record of the local school corporation's expulsion meeting, and consideration of the testimony and exhibits, the hearing officer makes the following findings of fact, conclusions of law, and recommended order:[42]

Findings of Fact

1. Petitioner is over eighteen (18) years of age.

2. Petitioner's parents are divorced. Pursuant to court order, Petitioner's father was awarded custody. Petitioner was last enrolled in Respondent's school district during the 1997-1998 school year while he was residing with his father.

3. Petitioner and his two siblings resided with their mother during the 1998-1999 and 1999-2000 school years, pursuant to an informal, annual agreement between Petitioner's parents. No modification was sought in the court order awarding custody to the father.

4. While residing with his mother, Petitioner attended school in Fort Campbell, Kentucky.

5. Petitioner moved out of his mother's residence in early September, 2000, and moved back to Fort Wayne, Indiana. Petitioner first moved in with his aunt, who resides in Respondent's school district. He later moved in with his girlfriend's parents.

6. Petitioner's father resides in Fort Wayne, within Respondent's school district.[43] Pursuant to the parents' divorce decree, Petitioner's father is to maintain insurance for Petitioner so long as Petitioner remains in school. Petitioner receives no other support from his father.

7. Petitioner's mother has not provided any financial support to Petitioner since he moved back to Fort Wayne in September, 2000.[44]

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[42]The written decision of the local expulsion examiner, as noted *supra*, lacks sufficient fact finding. As a result, it is necessary for the State Board of Education to determine factual findings necessary to reach legal conclusions. No deference need be shown to the locally derived decision.

[43]The Expulsion Examiner noted that while Petitioner's father resided in Indiana, his residence was unknown to Respondent. However, the testimony presented by Respondent at the expulsion meeting was that Petitioner's father resided within Respondent's school district. Documentation provided to Respondent by Petitioner contained Petitioner's father's address. The written evidence and testimony show Respondent did have knowledge of the residence of Petitioner's father.

[44]The Expulsion Examiner's summary of evidence indicated Petitioner's mother paid all of his insurance, car expenses, bought his clothes and food until she went to Hawaii in either November or December, 2000. There was no evidence or testimony to support the Hearing Examiner's summary of evidence. On the contrary, Petitioner testified, and his mother stated in

8. Petitioner obtained part-time work at Meijer (approximately 24 hours a week) and has been earning a pay check and paying taxes. Petitioner supplied to Respondent, at Respondent's request, copies of his pay stubs.

9. Petitioner pays for gasoline for his girlfriend's car, gave his girlfriend's mother money for groceries, buys his own clothing and makes other purchases.

10. Petitioner intends to file a tax return for the year 2000.

11. Petitioner opened a savings account at a local credit union and provided Respondent, at Respondent's request, with a copy of his credit union statement indicating an account had been opened and showing Petitioner's address within the boundaries of the Respondent.

12. Petitioner received medical care after moving back to Fort Wayne. The statement of medical services indicates an address for Petitioner within the boundaries of the Respondent. The statement further indicates Petitioner is financially responsible for payment of charges for services rendered. Petitioner provided Respondent, upon Respondent's request, with copies of the statement of medical services.

13. Petitioner made a layaway purchase at Big KMart. The layaway contract was provided to Respondent, upon Respondent's request. The layaway contract shows that Petitioner is financially responsible for payment, and further shows Petitioner's address as being within the boundaries of the Respondent.

14. Petitioner received correspondence from the Selective Service System which was mailed to him at his father's address, within the boundaries of the Respondent. Petitioner responded to the Selective Service System, providing a change of address indicating his current residence, within the boundaries of the Respondent. A copy of this correspondence was provided to Respondent, upon Respondent's request.

15. Respondent refused to permit Petitioner to enroll in school when he attempted to do so in September, 2000.

16. Petitioner was finally permitted to enroll in Respondent school corporation on November 6, 2000, after Petitioner's girlfriend's mother, at Respondent's insistence, signed a custodial statement and agreement. Although signing the custodial statement and agreement, the girlfriend's mother indicated on the agreement that Petitioner was an emancipated student, rather than an unemancipated student as Respondent's preprinted form otherwise indicated.

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a letter, that his mother provided no financial support once Petitioner moved out of his mother's home. Petitioner's evidence was not controverted by Respondent, and there was no determination made that Petitioner and his mother were not credible.

17. Although the local Expulsion Examiner's order allowed Petitioner to continue attending school until the end of the first semester on or about January 26, 2001, Petitioner chose to enroll in Respondent's continuing education program to enable him to earn high school credits. Because Petitioner was not permitted to enroll in school until November 6, 2000, he would have been unable to earn any high school credits even if he had attended school through the end of the semester. Petitioner is paying his own tuition and other related expenses (books, school supplies, etc.) to attend Respondent's continuing education program at the Anthis Career Center.

Conclusions of Law

1. Petitioner has not yet received a high school diploma. He wishes to continue his education in Indiana's public school system. He has requested a hearing under I.C. 20-8.1-6.1-10(a)(1) to challenge the decision of Respondent to expel him for lack of legal settlement based upon Respondent's assessment of what constitutes "emancipation." The Indiana State Board of Education has the responsibility to review such appeals and to determine a student's right to attend school in any Indiana public school corporation. Accordingly, the State Board of Education has jurisdiction in this matter.

2. Under I.C. 20-8.1-6.1-1(d), a student will be considered emancipated for legal settlement purposes when the student:
    1. Furnishes the student's support from the student's own resources;
    2. Is not dependent in any material way on the student's parents for support:
    3. Files or is required by applicable law to file a separate tax return; and
    4. Maintains a residence separate from that of the student's parents.

3. Petitioner is over the age of eighteen (18) years of age and is competent. Petitioner does not reside with his parents and is not dependent in any material way on them for support. It is not disputed that Petitioner resides separately from his either of his parents. He is employed and is paying applicable employment-related taxes. He is responsible for his own clothing, gasoline, some food, and medical expenses not covered by insurance.

4. Under Article 8, §1 of the Indiana Constitution, the General Assembly has the duty to establish "a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all." The General Assembly has the power to determine how and by what instrumentalities Indiana's common school[45] system is to be administered. Keller v. Reynard, 223 N.E.2d 774 (Ind.App. 1967). Statutory enactments passed under this constitutional authority are to be liberally construed for the encouragement of knowledge and learning. Patterson v. Middle Sch. Township, 98 N.E. 440 (Ind.App. 1912).

[45]"Common Schools" is synonymous with "public schools" and includes high schools. Chandler v. South Bend Comm. Schs., 312 N.E.2d 915 (Ind.App. 1974).

5. The General Assembly, by statute, requires all Indiana public schools to be open to students until "they complete their course of study, subject to the authority vested in school officials by law." I.C. 20-8.1-2-2. When construing the meaning of a statutory provision, a general rubric is to ensure that any construction is not "plainly repugnant to the intent of the legislature or of the context of the statute." I.C. 1-1-4-1. The General Assembly enacted I.C. 20-8.1-6.1 as a means for determining the "legal settlement" of a student. In accordance with the above, the legislative intent must be analyzed in the positive (ensuring that public schools are open to all until a course of study is completed) rather than in the negative (creating impediments to access to the public schools). The legal settlement of a student is important, but the language of the statute allows for numerous situations where legal settlement can occur, with a tacit acknowledgment that not all circumstances can be encompassed. Hence, the creation of the custodial forms under I.C. 20-8.1-6.1-1(c), the vesting of jurisdiction with juvenile courts in some situations under I.C. 20-8.1-6.1-1(a)(8), and similar circumstances recognizing divorce, abandonment, and emancipation.

6. A plain reading of I.C. 20-8.1-6.1-1(d) does not require a student who is emancipated to be "totally self-supporting." The statute refers to the student providing support "from the student's own resources." There is no additional qualification that such support be "total," a concept that defies definition much less legal analysis. Respondent's reliance on such a standard is contrary to law. The record supports the conclusion the Petitioner is providing support from his own resources, which would include his own resourcefulness.

7. There is no evidence to demonstrate that Petitioner is dependent for support in any material way upon his parents.

8. Petitioner is employed and paying applicable employment-related taxes. Petitioner intends to file a tax return for the year 2000.

9. It is not disputed by Respondent that Petitioner resides separately from his parents. However, in construing the requirement under I.C. 20-8.1-6.1-1(d) that Petitioner maintain a residence separate from that of the his parents, the local Expulsion Examiner focused solely upon "maintains a residence" and completely ignored "separate from that of the student's parents." There is no requirement that Petitioner provide total support to "maintain" a residence. Petitioner meets the requirements of maintaining a residence separate from that of his parents.

10. The term "residence," "resides," or comparable language when employed with respect to "legal settlement" means a "permanent and principal habitation that a person uses for a home for a fixed or indefinite period, at which the person remains when not called elsewhere for work, studies, recreation, or other temporary or special purpose." I.C. 20-8.1-6.1-1(b). Petitioner has established a "residence" for an indefinite period of time. All testimony indicates that this is Petitioner's "home." The residence is within the

boundaries of the Respondent. Petitioner has legal settlement within the boundaries of Respondent's school district.

11. Petitioner has satisfied the requirements of I.C. 20-8.1-6.1-1(d). He is emancipated for the purpose of determining legal settlement.

Discussion

Although the Expulsion Examiner determined Petitioner would be allowed to remain at Northrop High School until the end of the first semester to allow him to earn credits in classes he has been attending, this was an empty gesture, as Respondent had refused for nearly two months to allow Petitioner to enroll in school. Petitioner attempted to enroll in September, 2000, but was not permitted to enroll until November, 2000. As a result, Petitioner was unable to earn any credits during the first semester. Further, as a result of the expulsion proceedings, Petitioner was unable to enroll for the second semester.

Prior to the 1995 session of the General Assembly, Indiana law referred to disputes over legal settlement as "exclusions" rather than "expulsions," which prevented some of the confusion that apparently occurred here, judging from the typical discipline-based expulsion verbiage in the expulsion examiner's decision and appeal statement. Appeals involving exclusions under the former statutory provision at I.C.20-8.1-5-5(2) were taken to the State Board of Education, and the statute provided a "stay-put" provision until legal settlement was determined by the State Board. Without the "stay-put" provision, Petitioner was unable to enroll in Respondent's high school for the second semester of the 2000-2001 school year.

As was noted in the discussion section of the State Board's determination of *In the Matter of N. A. S. and Fort Wayne Community Schools*, Cause No. 0009028 (SBOE 2000), the State Board may wish to consider recommending to the General Assembly that elements of the previous law be reinstated in order to ensure more equitable access to publicly funded education. In this situation, Petitioner has lost a great deal. He has lost a full school year of attending Respondent's high school, and has incurred expenses for tuition at Respondent's continuing education program. Had Respondent been required to enroll Petitioner when he first presented himself, and been required to permit him to continue to attend school until the State Board appeal process was exhausted and the decision rendered was in Respondent's favor, Respondent would have the

right to seek payment of transfer tuition from the Petitioner. The current law works a hardship on students such as Petitioner.

ORDERS

1. Respondent's determination that Petitioner does not have legal settlement in its district is reversed.

2. Petitioner has established legal settlement within the boundaries of the Respondent and has the right to attend school tuition free.

3. Petitioner is considered emancipated for the purpose of determining legal settlement.

Dated: February 23, 2001 /s/ Dana L. Long, Hearing Examiner

INDIANA STATE BOARD OF EDUCATION ACTION

The Indiana State Board of Education, at its April 5, 2001 meeting, adopted the recommended decision of the Administrative Law Judge by unanimous vote.

APPEAL PROCEDURE

Any party aggrieved by the decision of the Indiana State Board of Education can seek judicial review from a civil court with jurisdiction within thirty (30) calendar days from receipt of this decision.

CUSTODIAL STATEMENT AND AGREEMENT INSTRUCTIONS
FOR SCHOOL CORPORATIONS, PARENTS, GUARDIANS, AND CUSTODIANS

"Legal settlement" of a student refers to the student's status with respect to the public school corporation that has the responsibility to permit the student to attend its local public schools without the payment of tuition. I.C. 20-8.1-1-7.1. In most cases, legal settlement is determined by where the student's parent lives. I.C. 20-8.1-6.1-1. Due to a variety of family circumstances, some students may not have legal settlement where the parent, or custodial parent, resides.

Indiana Code 20-8.1-6.1-1(c) requires the Superintendent of Public Instruction to prepare the form of agreement to be used when the legal settlement of the student is other than where the parent or custodial parent resides. **Form I:** *Custodial Statement and Agreement: Divorce, Separation, or Abandonment* and **Form II:** *Custodial Statement and Agreement: Third Party Custody* have been prepared pursuant to I.C. 20-8.1-6.1-1(c). In completing these forms, the parent(s), guardian(s), or custodian(s) should be certain to fill in all requested information and identify the reason the form is being utilized. Persons signing the form are affirming, under penalty of perjury, the accuracy of the information provided. Persons with whom the student resides must agree to accept the responsibilities and liabilities of the parent with respect to dealing with the school. Should it be determined that false information has been provided, or the student is residing with an individual other than the parent primarily for the purpose of attending a particular school, the parent(s), guardian(s) or custodian(s) may be responsible for the payment of tuition.

Form I: ***Custodial Statement and Agreement: Divorce, Separation, or Abandonment***
I.C. 20-8.1-6.1-1(a)(2)

Form I is utilized when the student is residing with a parent. Where the student's mother and father are divorced or separated, the legal settlement of the student is the school corporation whose attendance area contains the residence of the parent with whom the student is living, in the following situations:

1. Where no court order has been made establishing the custody of the student.
2. Where both parents have agreed on the parent with whom the student will live, including the following situations:
    1. There is no court order establishing custody.
    2. There is a court order establishing custody, but the parents have agreed the student will live with the noncustodial parent.
    3. The court order grants the parents joint custody. With joint physical custody, the student could establish legal settlement in either of the school districts in which his parents reside. In this situation, the parents can agree upon the parent with whom the student will reside for school attendance purposes. It is not required that the student reside with this parent 100% of the time.
3. Where the parent granted custody of the student has abandoned the student.

Form I is signed by both parents. If the student has been abandoned by the custodial parent, only one parent need sign the form.

Form II: ***Custodial Statement and Agreement: Third-Party Custody***
I.C. 20-8.1-6.1-1(a)(2), (a)(3), or (a)(5)

Form II is utilized when the student is residing with a person other than a parent. In the following circumstances, the legal settlement of the student is the attendance area of the person with whom the student is residing. **Form II** should be used in the following situations:

1. The student has been abandoned by the parent and left in the custody of another person.
2. The student is being supported by, cared for by, and living with some other person. (If the parents are able to support the student but placed the student in the home of another person, or permitted the student to live with another person, primarily for the purpose of attending school in that attendance area, the legal settlement of the student remains with the parent.)
3. The student's parents are living outside the United States due to educational pursuits or a job assignment; they maintain no permanent home in any school corporation in the United States; and they have placed the student in the home of another person.

Under typical situations, both the parent and the custodian or guardian with whom the student is residing are to sign **Form II**, verifying the accuracy of the information provided. However, there will be situations where the parent has effectively abandoned the child or cannot be located. Under such circumstances, signature of the parent is not necessary.

Disputes Concerning Legal Settlement

A school corporation must enroll a student who is presented for enrollment when the parent, guardian, or custodian claims the student has legal settlement within the school corporation. If the situation warrants, after enrolling the student, the school can initiate expulsion proceedings for lack of legal settlement, as permitted by I.C. 20-8.1-5.1-11. The student cannot be suspended from school for legal settlement purposes pending the outcome of the expulsion proceeding. The determination of the local expulsion examiner can be appealed to the Indiana State Board of Education. I.C. 20-8.1-6.1-10.

Additionally, or as an alternative to expulsion due to lack of legal settlement, either the school or the parent, guardian, or custodian of the student may request a hearing before the Indiana State Board of Education for a determination of the student's legal settlement or right to attend school.

If it is ultimately determined the student did not have legal settlement within the school corporation, the school may be entitled to recover tuition costs.

Appropriate utilization of **Form I** and **Form II** may help to resolve such disputes. Although statute dictates the creation of these forms, neither statute nor the forms will be able to address every custodial situation that may arise. Any questions concerning **Form I** or **Form II**, or any aspect of legal settlement, should be directed to the Legal Section of the Indiana Department of Education, (317) 232-6676.

FORM I
DOE 8/01

CUSTODIAL STATEMENT AND AGREEMENT
DIVORCE, SEPARATION, OR ABANDONMENT

This agreement is prepared by the Superintendent of Public Instruction as required by Indiana Code 20-8.1-6.1-1(c). **Form I** is to be signed by both parents except where the student has been abandoned by the custodial parent.

Student Information
Name: (last)_____(first)_____ (mi)_____
(street)_____(city)_____(state)_____(zip code)_____
Last school corporation attended:_____
Current school corporation:_____

Indicate the reason for utilization of this form:
____No court order has been made establishing custody of the student.
____The parents have agreed on the parent with whom the student will live.
____The parent granted custody of the student has abandoned the student.

Parent Information
Mother:
Name: (last)_____(first)_____ (mi)_____
(street)_____(city)_____(state)_____(zip code)_____

Father:
Name: (last)_____(first)_____ (mi)_____
(street)_____(city)_____(state)_____(zip code)_____

Parent with whom the student will live:_____.

_____ agrees to assume all the duties and be subject to all the
(parent with whom student will live)

liabilities of the parent of _____ with respect to dealing with the school
(*student)*
corporation and for all other purposes under Indiana Code 20-8.1. This agreement is binding from the date signed until terminated by either parent in writing.

I affirm, under the penalties for perjury, that the foregoing representations are true.

_____	_____
Name (printed)	Name (printed)
_____	_____
Signature	Signature
_____	_____
Date	Date

Acknowledged by _____ on behalf of _____
(*name and title*) (*school corporation*)
Date_____

FORM II
DOE 8/01

CUSTODIAL STATEMENT AND AGREEMENT:
THIRD PARTY CUSTODY

This agreement is prepared by the Superintendent of Public Instruction as required by I.C. 20-8.1-6.1-1(c).

Student Information
Name: (last)_____(first)_____ (mi)_____
(street)_____(city)_____(state)_____(zip code)_____
Last school corporation attended:_____
Current school corporation:_____

Indicate the reason for utilization of this form:
____ The student has been abandoned.
____ The parents are unable to support the student and the student is living with the guardian or custodian, who is supporting and caring for the student. The student was not placed with the guardian or custodian for the primary purpose of attending school in the school corporation of the guardian's or custodian's residence.
____ The parents are living outside the United States and maintain no home in any school corporation.

Parent Information
Name: (last)_____(first)_____ (mi)_____
(street)_____(city)_____(state)_____(zip code)_____

Guardian or Custodian Information
Name: (last)_____(first)_____ (mi)_____
(street)_____(city)_____(state)_____(zip code)_____

_____ agrees to assume all the duties and be subject to all the
(person with whom student will live)

liabilities of the parent of _____ with respect to dealing with the school
(*student*)
corporation and for all other purposes under Indiana Code 20-8.1. This agreement is binding from the

date signed until terminated by the parent or guardian in writing.

I affirm, under the penalties for perjury, that the foregoing representations are true.

_____ _____
Parent name (printed) Custodian or Guardian name (printed)

_____ _____
Signature Signature

_____ _____
Date Date

Acknowledged by _____ on behalf of _____
(*name and title*) (*school corporation*)
Date_____

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
MIDWESTERN DIVISION
CHICAGO OFFICE
111 NORTH CANAL STREET-ROOM 1053
CHICAGO, ILLINOIS 60606-7204

MAY 3 2000

Dr. Frederick B. Bechthold
Superintendent
Elkhart Community School Corporation
2720 California Road
Elkhart, Indiana 46514-1297

Re: 05001026

Dear Superintendent Bechtold:

This letter is to advise you of the disposition of the above-referenced complaint filed against the Elkhart Community School Corporation (Corporation) alleging discrimination based on disability which the U.S. Department of Education (Department), Office for Civil Rights (OCR) received on November 18, 1999. Specifically, the complainant alleged that the Corporation discriminated against Student A, a student with a disability (Diabetes) attending Pinewood Elementary School, by failing to: (1) provide her appropriate auxiliary aids and services during a recent school sponsored camping trip; (2) develop an appropriate individual plan to meet her known health needs, (3) ensure the privacy of Student A's personal health needs, and (4) inform parents of students with disabilities of their rights.

OCR has responsibility to address the complaint under Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794 and its implementing regulation, 34 C.F.R. Part 104, which prohibit discrimination on the basis of mental or physical disability in education programs and activities receiving Federal financial assistance from the Department. OCR also has been designated as an agency responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (ADA). Title II prohibits discrimination on the basis of disability in public elementary and secondary education systems and institutions, public institutions of higher education and vocational education (other than schools of medicine, dentistry, nursing and other health-related schools), and public libraries.

In our letter of December 9, 1999, OCR advised you that we would strive to resolve the above-referenced complaint against the Corporation promptly and appropriately. To that end, Dr. Charles M. Hegarty, a senior member of my team, worked with the complainant and the Corporation's administrative staff to resolve the matter through mediation. At the request of the complainant, the mediation process was terminated. OCR, therefore, continued to work with the Corporation's administrative staff in order to bring the matter to resolution. On May 1, 2000, as a direct result of OCR's discussions with the administrative staff, the Corporation provided OCR with a signed Voluntary Resolution Agreement (copy enclosed) that, when implemented, will resolve the issues raised in the above-referenced complaint. The Voluntary Resolution Agreement does not constitute an admission of any violation of Section 504 and/or Title II of the ADA or their implementing regulations nor should it be construed as such. To ensure that the terms of the Agreement are met, OCR will monitor the implementation thereof. If the Corporation fails to fully implement the Agreement, OCR would immediately resume its investigation.

OCR, by this letter, accepts the Voluntary Resolution Agreement as an appropriate resolution of the allegations of this case. It provides that the Corporation shall follow the Section 504 process to provide all students with disabilities, who have been identified, evaluated and determined eligible with appropriate aids and services. In part, the Agreement requires the Corporation to follow the Section 504 process for Student A, develop an appropriate individual program for Student A, if found eligible, and provide appropriate aids and services to Student A. The Agreement provides that the Corporation will ensure the privacy of medical health information for students with disabilities. Further, the Agreement requires that the Corporation will provide general notice to parents of children with disabilities about the availability of appropriate aids and services pursuant to Section 504. In addition, it requires that the Corporation will provide specific notification to parents of students known to have diabetes about the student's possible eligibility for aids and services pursuant to Section 504.

Therefore, based on the Agreement, we have determined that the issues raised in the complaint have been addressed and resolved. Accordingly, OCR is closing the complaint effective the date of this letter.

We wish to express our appreciation for the cooperation that you extended to OCR during the course of our investigation. Moreover, special gratitude is extended to Dr. John Hutchings for his substantial efforts in bringing about the resolution of this matter. If you have any questions about this letter, please call Dr. Hegarty at 312-886-8393.

Sincerely,

James E. Heffernan
Team Leader

Enclosure

VOLUNTARY RESOLUTION AGREEMENT

The Elkhart Community School Corporation (Corporation) acknowledges that it may not discriminate against any child who has a disability within the meaning of the regulations implementing Section 504 of the Rehabilitation Act of 1973 (Section 504) and the Americans with Disabilities Act of 1990 (ADA). The Corporation is committed to identifying and locating every qualified student with a disability residing within the Corporation and taking appropriate steps to notify such students and their parents or guardians of its obligations. Further, the Corporation is committed to evaluating the needs of these students, and to providing all eligible students with disabilities with the related aids and services required by these regulations. Moreover, the Corporation is committed to providing all students with disabilities who have been identified, evaluated and determined eligible to receive related aids and services with those aids and services deemed appropriate. In light of this policy, in good faith effort to resolve the allegations in this complaint (#05001026) and to comply with the provisions and requirements of the regulations implementing Section 504 and the ADA, the Corporation provides the following assurances:

1. Beginning with the date of this Voluntary Resolution Agreement (Agreement), the Corporation shall undertake to identify and locate every potential qualified student with a disability residing within the Corporation. Accordingly, by August 21, 2000 the Corporation will develop and provide an appropriate notice to be given to the parents of all students enrolled in the Corporation of the availability of services pursuant to Section 504. These notices will include information as to the right of parents to request an individual evaluation to determine a student's eligibility for services. With the consent of a parent, the Corporation will conduct an individual evaluation of a student and convene a Case Conference for the purpose of determining a student's eligibility for services. The Corporation shall take appropriate steps to notify potential students with disabilities and their parents and/or guardians of the Corporation's obligations under the above-noted regulations by publishing a notice to this effect in local newspapers and school handbooks. By August 21, 2000, a copy of this Notice shall be provided to OCR.

2. With parental consent, the Corporation will conduct an individual evaluation of Student A to determine the student's eligibility for educational and related services. The Corporation will convene a Case Conference with Student A's parents and its staff and teachers to review and discuss the evaluation and Student A's eligibility, as a student with a disability, for related aids and services. Student A's eligibility will be determined within 30 days of the date this Voluntary Resolution Agreement is signed, or the date when parental consent is received, whichever date comes later.

3. If the Case Conference determines that Student A is eligible, as a student with a disability, for related aids and services, the Case Conference will develop an appropriate individualized education program (IEP). This IEP will identify those aids and services necessary to effectively meet Student A's needs, as determined by the Case Conference.

4. The parents of each student enrolled in the Corporation at the time of this agreement, who is known to have diabetes will be notified as to a child's possible eligibility for services pursuant to Section 504. By June 5, 2000 the Corporation will provide OCR with a copy of this notification.

5. Any student with diabetes, who is determined to be eligible for services pursuant to Section 504, will be allowed to participate in non-academic and extracurricular activities, including field trips and other activities, to the maximum extent appropriate to the needs of that student, as determined by the Case Conference.

6. For any student with diabetes who is determined to be eligible for services pursuant to Section 504, the Corporation will designate personnel to provide such student with adequate diabetes care and back up, as determined by the Case Conference. Designated care and backup personnel will receive training in diabetes care. Trained care and backup personnel will be designated not only in the academic setting, but also in non-academic and extracurricular activities in which an eligible student participates.

7. For each of those students with diabetes who is determined to be eligible for services pursuant to Section 504, the Corporation will update and review annually the IEP which incorporates necessary aids and services to effectively meet student's needs, as determined by a Case Conference.

8. The Corporation will ensure that the privacy of the medical and health information of all students with disabilities is maintained.

9. By June 5, 2000, the Corporation will provide OCR with the following:

   - A copy of the notification described in Item 4 above; and,
   - A detailed report with copy of relevant documents regarding the actions undertaken by the Corporation under Item 2 and Item 3 above.

10. By August 21, 2000, the Corporation will provide OCR with the following:

    - A copy of the Notice described in Item 1 above.

11. By November 15, 2000, the Corporation will provide OCR with a detailed report regarding the results of the actions undertaken by the Corporation under Item 4 through and including Item 7 and their impact on all students involved.

John S. Hutchings

representing

Elkhart Community Schools

05/02/00

(date)